Supreme Court, U.S.
FILED
MAY 13 2010
OFFICE OF THE CLERK

No. 09-091396

IN THE

Supreme Court of the United States

RICKY LEE ALLSHOUSE, JR.,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari
to the Pennsylvania Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a child's statements in an interview with a child protection agency worker investigating suspicions of past abuse are "testimonial" evidence subject to the demands of the Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36 (2004).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ricky Lee Allshouse respectfully petitions for a writ of certiorari to the Pennsylvania Supreme Court in this case.

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court (Pet. App. 1a) is reported at 985 A.2d 847. The opinion of the Pennsylvania Superior Court (Pet. App. 53a) is reported at 924 A.2d 1215. The relevant trial court order is unpublished but is recited at Pet. App. 6a.

JURISDICTION

The Pennsylvania Supreme Court issued a final judgment affirming petitioner's conviction on December 29, 2009. On March 17, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to April 28, 2010. *See* 09A869. On April 9, 2010, Justice Alito further extended the time within which to file a petition for a writ of certiorari to and including May 13, 2010. *See id.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Although the Pennsylvania Supreme Court's decision remanded the case for adjustment of petitioner's fine, restitution, and costs, it affirmed his conviction. Pet. App. 1a, 85a-86a. The conviction that petitioner challenges therefore constitutes a "final judgment" under Section 1257(a). *See Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

42 Pa. Cons. Stat. § 5985.1, **Admissibility of certain statements**, provides:

(a) General rule. – An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:

(1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) the child either:

(i) testifies at the proceeding; or

(ii) is unavailable as a witness.

(a.1) Emotional distress. – In order to make a finding under subsection (a)(2) (ii) that the child is unavailable as a witness, the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering

serious emotional distress that would substantially impair the child's ability to reasonably communicate. In making this determination, the court may do all of the following:

(1) Observe and question the child, either inside or outside the courtroom.

(2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting.

STATEMENT OF THE CASE

This case presents a pressing constitutional issue concerning the administration of criminal justice over which courts across the country are deeply divided: whether a child's statements to a child protection worker investigating possible abuse are testimonial under the Confrontation Clause, and thus may not be introduced against the accused absent an opportunity for cross-examination. A majority of state and federal courts holds that such statements are testimonial. In this case, however, three different levels of Pennsylvania courts employed three different lines of reasoning to find such statements nontestimonial.

1. On May 20, 2004, petitioner Ricky Lee Allshouse was in his living room with his children, four-year-old A.A. and seven-month-old twins J.A. and M.A. Their mother was in the kitchen. According to the mother, she heard a chair squeak and one of the children begin to cry. She entered the living room and found A.A. sitting with J.A.'s head on her lap. Petitioner was on his way out of the room. Believing that J.A. was hurt, she took him to the hospital, where a doctor determined that he had a spiral fracture to his right arm.

Suspecting abuse, the hospital summoned John Geist, a caseworker with Jefferson County Children and Youth Services (CYS). Such caseworkers "investigate" "allegations of abuse and neglect of children," Tr. 93 (9/19/05), and state law requires such workers to "cooperate and coordinate, to the fullest extent possible" with law enforcement. 55 Pa. Code § 3490.108. To that end, Geist received extensive training before starting his job in "child intensive" investigation and "forensic interviewing" techniques, including "[c]ollecting statements from victims [and] witnesses." Tr. 12, 17 (9/16/05).

Geist first made a "safety plan" to ensure the well-being of the children "until the investigation was fully completed." Tr. 7 (9/16/05). Under the plan, he removed the children from their parents' home and arranged for them to stay with their paternal grandparents. Geist then interviewed both parents. Petitioner denied hurting A.A. and, among other things, suggested that perhaps A.A. might have twisted J.A.'s arm. The mother likewise denied hurting J.A.

Seven days into the investigation, Geist went to the grandparents' home to interview A.A. He "had concerns she may have been a witness to the assault," Tr. 96 (9/19/05), and he intended "to investigate and figure out what happened." *Id.* at 120. Upon his arrival, he "introduced himself to A.A," and he "shook her hand." Pet. App. 20a. She remembered Geist as "the one that came in and transported the children" away from the parents into protective custody. Tr. 14 (9/16/05). Geist "asked her permission to speak with her." Pet. App. 20a. After A.A. assented, he escorted

her to the front porch of the house, where they could speak privately. Pet. App. 3a.

Geist began the interview by asking A.A. whether "she could remember her brother being hurt." Pet. App. 3a n.4. She said "yes." He next asked if A.A.'s other brother, her mother, or A.A. herself had hurt J.A. A.A. answered "no" to each question. Geist then asked whether petitioner had hurt J.A. A.A. answered "yes." Geist asked A.A. "if she could remember how [J.A.] got the injury." A.A. "put her hand on [Geist's] arm and said [petitioner] grabbed her [sic] right above the elbow and pulled." *Id.*

Geist reported A.A.'s accusation to his supervisor, who reported it to the police. Geist then "typed up a bunch of notes" from his interviews and "gave them to the district attorney." Tr. 117 (9/19/05). Geist later met with a police officer and the district attorney, and participated in "[a] free-flow of information." *Id.* at 116. The district attorney also gave Geist various "instructions" for conducting future interviews. *Id.*

Geist further arranged for Dr. Allen Ryen, a child psychologist who conducts forensic interviews for CYS, to become part of the investigative team. Dr. Ryen subsequently interviewed A.A., and she repeated her allegation that "Daddy grabbed and yanked the infant." RR 219a.

Three days later, the police arrested petitioner and charged him with five different crimes arising from the incident: aggravated assault, simple assault, endangering the welfare of a child, reckless endangerment, and harassment.

2. During pretrial proceedings, the Commonwealth filed a motion in limine asking the trial court to declare that A.A.'s accusatory statements to Geist and Dr. Ryen were admissible at trial regardless of whether A.A. testified. The Commonwealth relied on a Pennsylvania statute allowing the prosecution to introduce a child's "out-of-court statement" alleging assault (or certain other crimes) in place of live testimony, provided the court finds that the statement contains "sufficient indicia of reliability" and the court declares the child "unavailable." 42 Pa. Cons. Stat. § 5985.1(a).

The trial court then held a hearing to determine the admissibility of A.A.'s accusations. Geist and Dr. Ryen testified at the hearing. Without requiring A.A. to appear, the court deemed her statements to Geist reliable "because of the content, location, and nature of that statement." Tr. 53 (9/16/05). The court also ruled that A.A. was "unavailable" to testify at trial, basing that finding on Dr. Ryen's prediction that A.A. would suffer emotional distress if she testified. *Id.*

Petitioner objected to the court's ruling, arguing that it would violate the Confrontation Clause for the prosecution to introduce A.A.'s statements without her taking the stand. Petitioner specifically relied on this Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004), that a witness's "testimonial" statements are inadmissible when the defendant lacks an opportunity for cross-examination. Petitioner contended that A.A.'s statements were testimonial because they described past criminal events in response to questions from a government agent who was gathering evidence for a potential prosecution. The trial court rejected the argument,

ruling that A.A.'s statements were nontestimonial because a child in her position would not have been able to "make the determination that [the statements] would be available for use later at trial." Pet. App. 6a.

At trial, the Commonwealth introduced A.A.'s statements through both Geist and Dr. Ryen. These statements constituted the only direct evidence that petitioner caused J.A.'s injury. Petitioner, for his part, continued to maintain that he never hurt J.A. and that someone else must have done it.

After three hours of deliberations, the foreman told the judge that he doubted the jury could reach a unanimous verdict. The judge encouraged the jury to reach a consensus on at least some charges. The jury then resumed deliberations and convicted petitioner of simple assault and endangering the welfare of a child. It acquitted him on the remaining charges. The judge sentenced petitioner to one to two years in prison, plus various fines and costs, and restitution.

3. The Pennsylvania Superior Court affirmed petitioner's conviction and prison sentence.[1] Notwithstanding Geist's trial testimony that his purpose in interviewing A.A. had been "to investigate and figure out what happened," Tr. 120 (9/19/05), the court held that A.A.'s statements during her interview with Geist were nontestimonial because Geist's "primary purpose" was "to ensure both A.A. and her siblings' welfare was secure." Pet. App. 67a.

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[1] It also vacated and remanded certain fines, costs, and the order of restitution. But those matters are irrelevant here.

Having found A.A.'s statements to Geist nontestimonial, the appellate court deemed it unnecessary to determine whether her subsequent statements in her forensic interview with Dr. Ryen were testimonial. Even if the trial court had erred in admitting the statements, the appellate court held, the error would have been harmless because the statements were "merely duplicative" of the statements she had made during her interview with Geist. Pet. App. 73a.

4. The Supreme Court of Pennsylvania affirmed. Departing from the theories advanced by the trial and appellate courts, as well as from the argument advanced in the Commonwealth's brief, a four-justice majority held that A.A.'s statements were nontestimonial because Geist was an "agent of law enforcement" who was responding to "an ongoing emergency." The majority reasoned that the possibility that "A.A. had caused J.A.'s injury" made it "incumbent upon Geist to immediately investigate" because "A.A. could do further harm to J.A." Pet. App. 22a. Like the Superior Court, the majority did not address whether A.A.'s statements to Dr. Ryen were testimonial, finding them "merely cumulative" of Geist's testimony. Pet. App. 23a.

Two of the four justices in the majority wrote separately to "highlight" what they see as "the tension between the testimonial litmus of *Crawford v. Washington* and the plain terms of the Sixth Amendment." Pet. App. 40a (Saylor, J., concurring) (citation omitted). They also pointed out that there are still "many open questions" under *Crawford*, "leav[ing] lower-tier federal courts and state courts in a difficult position in terms of predicting the

appropriate limits of this critical Sixth Amendment provision." *Id.*

Two more justices wrote separately to concur in the result only. These justices disagreed that Geist acted as an agent of law enforcement and thus concluded that the "ongoing emergency" test did not apply at all. Pet. App. 50a (Baer, J., concurring in the result). Instead, they contended that A.A.'s statements to Geist were not testimonial because "an objective person in A.A.'s position would not reasonably have anticipated that her statements might be used in a later prosecution of [petitioner]." Pet. App. 51a.

The final justice on the court did not participate in the case, Pet. App. 39a, because he had been a member of the Superior Court panel below.

REASONS FOR GRANTING THE WRIT

Two years ago, in a case on interlocutory review involving accusations that a child made during an interview with a child protection worker, twenty-six states urged this Court to address the "inconsistent results" and growing legal uncertainty over whether statements to government officers investigating possible past child abuse are testimonial under this Court's Confrontation Clause jurisprudence. Br. of Missouri et al. as Amicus Curiae Supporting Pet'r at 2, *Iowa v. Bentley*, No. 07-886 (2008). The states called the matter one "of great importance." *Id.* at 1. The National District Attorneys Association echoed this request, explaining that "prosecutors across this country are eager for a resolution" of the issue. Mot. for Leave to File Br. and Br. of National District Attorneys Ass'n as Amicus Curiae Supporting Pet'r at

2, *Iowa v. Bentley*, No. 07-886 (2008). This Court, however, declined to take up the issue at that time.

Since that denial of certiorari, several more courts have addressed whether witnesses' statements in interviews with child protection workers are testimonial, and the conflict over the issue has solidified and become deeply entrenched. These developments have erased any prospect that continued litigation will bring order to this area of law absent a direct decision from this Court. This case squarely presents the issue on a complete trial record and exemplifies why this Court should promptly clarify that such statements are testimonial.

I. Courts Are Deeply Divided Over Whether A Child's Statements In An Interview With A Child Protection Worker Investigating Allegations Of Past Abuse Are Testimonial.

A. Legal and Factual Background

1. The Confrontation Clause "[h]istorically" prohibited the defendant from being "denied the opportunity to challenge his accusers in a direct encounter before the trier of fact." *Ohio v. Roberts*, 448 U.S. 56, 78 (1980) (Brennan, J., dissenting). Yet during the generation that followed this Court's decision in *Roberts*, this Court's jurisprudence allowed the prosecution to introduce out-of-court accusations made to government officials without the declarants taking the stand, so long as a trial court deemed the accusations "reliable." *Id.* at 66; *accord Lilly v. Virginia*, 527 U.S. 116, 123-24 (1999)

(plurality opinion); *Idaho v. Wright*, 497 U.S. 805, 814-15 (1990).

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court restored the Confrontation Clause to its traditional mode of operation. It held that the prosecution may not introduce "testimonial" hearsay from an unavailable declarant unless the defendant had a prior opportunity for cross-examination. *Id.* at 54, 68. This Court "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. But it reminded courts that the "principal evil" the Confrontation Clause was designed to prevent was "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. Thus, at the very least, the "testimonial" concept must encompass accusatory statements made to "government officers perform[ing] the investigative functions primarily associated with the police." *Id.* at 53; *see also Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2548 (2009) (Kennedy, J., dissenting) (Clause is designed to "alleviate the danger of" conducting trials based on "one-sided interrogations by adversarial government officials who might distort a witness's testimony").

In *Davis v. Washington*, 547 U.S. 813 (2006), this Court elucidated the distinction between testimonial and nontestimonial statements in the context of interrogations by the police or their agents. This Court held that statements in this context are nontestimonial when they are made "to enable police assistance to meet an ongoing emergency." *Id.* at 822. But they are testimonial when "the primary purpose of the interrogation is to establish or prove

past events potentially relevant to later criminal prosecution." *Id.* Applying this dichotomy to the two cases before it, this Court held that statements at the beginning of "a [911] call for help" in which the declarant "was speaking about events *as they were actually happening*" were nontestimonial. *Id.* at 827. In contrast, a witness's statements in her home describing a just-completed domestic assault, while the suspect was in another room, were testimonial. Calling the latter scenario a "much easier" case, this Court explained that the statements were testimonial because they were "an obvious substitute for live testimony," in that they did "precisely *what a witness does* on direct examination": They recounted, in response to governmental questioning, "some time after the events described were over," how "potentially criminal past events began and progressed." *Id.* at 829-30.

2. The question now arises whether statements children make to specialized government officials (usually called "child protection workers" or something similar) who investigate suspicions of past abuse are testimonial.

The issue arises as a result of the method of investigating and prosecuting child abuse cases that states developed during the *Roberts* era. As law enforcement came to appreciate that "[t]echniques used in interviewing adult crime victims will not work with children," states and local governments assigned the task of conducting such interviews to other individuals with special training "to communicate effectively with children." Am. Prosecutors Research Inst., Investigation and Prosecution of Child Abuse 37 (3d ed. 2004).

Nowadays, some localities use child protection agency caseworkers, while other jurisdictions use trained interviewers at "child advocacy centers" to conduct such interviews. *See* Lindsey E. Cronch et al., *Forensic Interviewing in Child Sex Abuse Cases: Current Techniques and Future Directions*, 11 Aggression & Violent Behavior 195, 196, 204 (2006). But regardless of the interviewers' exact titles or where they conduct their interviews, the modern investigative model deploys specially trained individuals to conduct forensic interviews, in coordination with the police, to determine whether abuse has occurred.[2]

Pennsylvania's method is typical. The Child and Youth Services (CYS) division of its Child Protective Services agency is "the investigating arm" in charge of conducting initial inquiries into child abuse allegations. Pet. App. 22a. State law requires caseworkers at this government division to coordinate their work "to the fullest extent possible" with "law enforcement agencies." 55 Pa. Code § 3490.108; *see also* 23 Pa. Cons. Stat. §§ 6302(b), 6365(c). Moreover,

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[2] *See* Nat'l Dist. Attorneys Ass'n, Multidisciplinary/Multi-Agency Child Protection Teams Statutes (2008), http://www.ndaa.org/pdf/ncpca_statute_multidisciplinary_nov_08.pdf (compiling statutes from 49 states, District of Columbia, and three territories); Anna Richey-Allen, *Note*, *Presuming Innocence: Expanding the Confrontation Clause Analysis to Protect Children and Defendants in Child Sexual Abuse Prosecutions*, 93 Minn. L. Rev. 1090, 1092 (2009) (citing Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child at a Time*, 28 Hamline J. Pub. L. & Pol'y 315, 329-31 (2006)).

to "avoid duplication of fact-finding efforts and interviews," state law requires district attorneys and CYS to establish standards for "coordinating investigations" and "sharing the information obtained as a result of any interview." 23 Pa. Cons. Stat. § 6365(c).

At the same time that states were changing how they investigated suspicions of child abuse, they also enacted special hearsay statutes – sometimes called "tender years" laws – allowing them to use the products of their *ex parte* interviews with child witnesses in place of the witnesses' in-court testimony at trial. *See Snowden v. State*, 846 A.2d 36, 39 n.7 (Md. App. 2004) (collecting such statutes), *aff'd*, 867 A.2d 314 (Md. 2005); Br. of Missouri et al. as Amicus Curiae Supporting Pet'r at 2, *Iowa v. Bentley*, No. 07-886 (2008).

Pennsylvania's tender years law is, once again, typical. Enacted in 1989, and amended in 1996 and 2000, it deems any accusation "describing any of the offenses enumerated in 18 Pa. [Cons. Stat.] Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery)," automatically exempt from the rule against hearsay, provided the trial judge finds (1) that the accusation contains "sufficient indicia of reliability" and (2) that the child is "unavailable" to testify at trial. 42 Pa. Cons. Stat. § 5985.1(a). In order to declare a child accuser "unavailable," a court need not find that she is incompetent to testify. Instead, a court may find the child unavailable if it determines that in-court "testimony by the child as a witness will result in the

child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate." *Id.* As the Commonwealth explained in the Pennsylvania Supreme Court, children's "memories fade and their performance as witnesses is anything but stable," impeding the prosecution's "effective presentation of evidence." Br. of Appellee in Pa. S. Ct. at 2. The "tender years" system solves this problem by allowing prosecution by *ex parte*, out-of-court interviews.

The extent to which *Crawford* calls this system into question is "[o]ne big area of contention and confusion" that commentators have opined "will ultimately have to be resolved by the United States Supreme Court." Eileen A. Scallen, *Coping with* Crawford*: Confrontation of Children and Other Challenging Witnesses*, 35 Wm. Mitchell L. Rev. 1558, 1586 (2009). For six years now, "[t]he varying analyses employed by courts to determine the admissibility of out-of-court statements made by children to nonlaw enforcement personnel has led to inconsistent results." Pilar G. Kraman, *Divining the U.S. Supreme Court's Intent: Applying* Crawford *and* Davis *to Multipurpose Interrogations by Non-Law Enforcement Personnel*, 23 Crim. Just. 30, 30 (Winter 2009); *see also Flores v. State*, 120 P.3d 1170, 1177 (Nev. 2005) ("courts nationwide have encountered considerable difficulty in negotiating the fine line between" testimonial and nontestimonial statements in this realm); *State v. Hopkins*, 154 P.3d 250, 256 (Wash. App. 2007) ("This issue represents an unsettled area of law.").

B. The Conflict Among Federal And State Courts

Federal and state courts are now deeply divided over whether statements children make in interviews conducted by child protection workers investigating suspicions of past abuse are testimonial.

1. The majority of appellate courts to address the issue has held that statements to child protection workers investigating past abuse are testimonial. One federal court of appeals and eight state courts of last resort have reached this conclusion. *See Bobadilla v. Carlson*, 575 F.3d 785, 787 (8th Cir. 2009) (statements to "a social worker employed by the Kandiyohi County Family Service Department"), *cert. denied*, 130 S. Ct. 1081 (2010);[3] *State ex rel. Juvenile Dep't v. S.P.*, 215 P.3d 847, 849 (Or. 2009) (statements to "a social worker" at the regional child advocacy center);[4] *State v. Contreras*, 979 So. 2d 896, 898 (Fla. 2008) (statements to the "coordinator of a Child Protection Team"); *In re Rolandis G.*, 902 N.E.2d 600, 603 (Ill. 2008) (statements to "a child advocate at Rockford's Carrie Lynn Children's Center"), *cert. denied*, 129 S. Ct. 2747 (2009);[5] *State*

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[3] *See also United States v. Bordeaux*, 400 F.3d 548, 555 (8th Cir. 2005) (statements to an interviewer at a "center for child evaluation").

[4] *See also State v. Mack*, 101 P.3d 349, 349 (Or. 2004) (statements to "a Department of Human Services (DHS) caseworker").

[5] *See also People v. Stechly*, 870 N.E.2d 333, 339 (Ill. 2007) (statements to "a social worker at the [public] school where [the declarant] attended kindergarten"); *In re T.T.*, 892 N.E.2d 1163,

v. Bentley, 739 N.W.2d 296, 297 (Iowa 2007) (statements to "a counselor at St. Luke's Child Protection Center"), *cert. denied*, 552 U.S. 1275 (2008); *State v. Henderson*, 160 P.3d 776, 779 (Kan. 2007) (statements to a "social worker" with "the Kansas Department of Social and Rehabilitation Services"); *State v. Justus*, 205 S.W.3d 872, 876 (Mo. 2006) (statements to "a counselor and a licensed social worker for the Northwest Missouri Children's Advocacy Center in St. Joseph" and a social worker who "investigates child abuse and neglect for the division of family services"); *State v. Snowden*, 867 A.2d 314, 316 (Md. 2005) (statements to "a sexual abuse investigator for the Montgomery County Department of Health and Human Services"); *Flores*, 120 P.3d at 1172 (Nev. 2005) (statements to "Child Protective Services" investigator).

Five other states' intermediate appellate courts also have held that these kinds of statements are testimonial. *See State v. Hopkins*, 154 P.3d 250, 251 (Wash. App. 2007) (statements to "a CPS social worker"); *Rangel v. State*, 199 S.W.3d 523, 529 (Tex. App. 2006) (statements to "a CPS investigator"), *review dismissed*, 250 S.W.3d 96 (Tex. Crim. App. 2008); *Anderson v. State*, 833 N.E.2d 119, 121 (Ind. App. 2005) (statements to "the Owen County Office of Family and Children"); *T.P. v. State*, 911 So. 2d 1117, 1119 (Ala. Crim. App. 2004) (statements to a "social worker" with "the Baldwin County Department of Human Resources"); *People v. Sisavath*, 13 Cal. Rptr.

1165 (Ill. App. Ct. 2008) (statements to "a Department of Children and Family Services (DCFS) investigator").

3d 753, 756 (Cal. Ct. App. 2004) (statements to "a trained interviewer at Fresno County's Multidisciplinary Interview Center").

The courts that have deemed statements to child protection workers testimonial have reasoned that the "primary purpose" of such interviews is "to establish or prove past events potentially relevant to later criminal prosecution." *Justus*, 205 S.W.3d at 880. Emphasizing that state law requires child protection workers to coordinate their investigations with police and prosecutors, these courts treat such workers as extensions of (or specialized replacements for) law enforcement. *Henderson*, 160 P.3d at 789-90; *see also Bobadilla*, 575 F.3d at 793 (child protection worker "act[s] as a substitute for a police interrogator"); *Bentley*, 739 N.W.2d at 299 (same); *Contreras*, 979 So. 2d at 905 (child protection worker "serv[es] as a police proxy"). Even though child protection workers investigating past abuse are often also attempting to prevent further harm or to facilitate some kind of future medical treatment, these courts do not believe that any such dual purpose in the interviews changes the analysis. *See, e.g.*, *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005). The "ultimate question," they emphasize, is the "functional" one "whether the declarant's statements [a]re the equivalent of 'testimony.'" *S.P.*, 215 P.3d at 864. That test is met here, these courts hold, because the statements are made during examinations probing whether criminal events occurred in the past. *Id* at 865.

These courts also emphasize that the fact that the declarants in these cases are children does not deprive their otherwise testimonial statements of

that status. Some courts reason that *Crawford* and *Davis* establish "an objective test" concerning whether the setting of the interview resembles an *ex parte* examination, and that this test renders a declarant's age irrelevant. *Snowden*, 867 A.2d at 329; *accord Bentley*, 739 N.W.2d at 300. Others "treat the child's age as one of the objective circumstances to be taken into account," *People v. Stechly*, 870 N.E.2d 333, 363 (Ill. 2007), but "not dispositive of whether [the child's] statement is testimonial." *Henderson*, 160 P.3d at 785. Either way, these courts maintain that when a child describes past events to a child protection worker seeking to determine whether criminal conduct has occurred, the child's statements "lie at the very core of the definition of 'testimonial.'" *Bentley*, 739 N.W.2d at 300.

2. In direct contrast, four state supreme courts have held that child statements in interviews with child protection workers are nontestimonial. *See* Pet. App. 2a, 23a (statements to a "caseworker" with "Jefferson County Children and Youth Services"); *State v. Buda*, 949 A.2d 761 (N.J. 2008) (statements to interviewer from the Division of Youth and Family Services' "Office of Child Abuse Control"); *State v. Arroyo*, 935 A.2d 975 (Conn. 2007) (statements to "a licensed clinical social worker and forensic interviewer" at the "Yale Sexual Abuse Clinic"); *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006) (statements to "a Kandiyohi County child-protection worker from the Family Service Department"), *cert. denied*, 549 U.S. 953 (2006). These courts employ at least three distinctly different rationales for finding such statements nontestimonial.

a. Three courts have held – like Justice Baer's concurrence in the Pennsylvania Supreme Court, Pet. App. 50a – that statements to child protection workers investigating past abuse are nontestimonial because such workers are not "an extension of law enforcement." *Buda*, 949 A.2d at 779. In other words, these courts reason, the interviews are not designed to gather evidence for a potential prosecution. Instead, the Minnesota Supreme Court asserts that "the overriding purpose" of such an interview is to "assess[] whether abuse occurred, and whether steps [a]re therefore needed to protect the health and welfare of the child." *Bobadilla*, 709 N.W.2d at 255. The Connecticut Supreme Court characterizes the primary purpose of such an interview as facilitating mental health care. *Arroyo*, 935 A.2d at 997. And the New Jersey Supreme Court maintains that a child protection worker's questions are designed to "gather[] data in order to assure a child's future well-being." *Buda*, 949 A.2d at 780. Indeed, the New Jersey Supreme Court contends that when child protection workers conduct interviews directly in collaboration with prosecutorial authorities, the presence of both types of governmental employees makes "[t]he division of duties . . . clear: while the Prosecutor's Office investigator [is] charged with collecting evidence of the crimes visited on [the victim-declarant], the DYFS worker [is] responsible for ensuring [his] continued safety and well-being." *Buda*, 949 A.2d at 780.

b. Two courts have held that statements to child protection workers investigating past abuse are nontestimonial because the purpose of such

interviews is to address an "ongoing emergency." In the New Jersey Supreme Court's view, a child protection worker is not "an agent/proxy or an operative for law enforcement," nor is such a worker's purpose in conducting an interview "to collect evidence of past events to secure the prosecution of an offender." *Buda*, 949 A.2d at 779. Rather, the purpose is to protect a child from future harm. *Id.* Thus, a child's accusatory statement in such an interview is "no different than the domestic abuse victim's 911 call [in] *Davis*." *Buda*, 949 A.2d at 780.

The Pennsylvania Supreme Court's holding here starts from a premise opposite the New Jersey Supreme Court's "ongoing emergency" analysis – namely, it views a child protection worker investigating suspicions of abuse as "an agent of law enforcement for purposes of a *Davis* analysis." Pet. App. 22a. The Pennsylvania Supreme Court also leaves open the possibility, in contrast to the New Jersey Supreme Court, that the primary purpose of a child protection interview is "to establish or prove past events potentially relevant to later criminal prosecution," Pet. App. 23a; *see also* Pet. App. 20a n.12. But the Pennsylvania Supreme Court deems that possibility irrelevant, reasoning that accusations made during such an interview are nontestimonial because they are made to allow law enforcement to meet an "ongoing emergency" – specifically, the fact that a victim might suffer "further harm." Pet. App. 21a-22a. Thus, like the New Jersey Supreme Court, the Pennsylvania Supreme Court deems all statements in child protection worker interviews to be nontestimonial – insofar as further harm is always

a serious possibility until a perpetrator of past child abuse is identified and incapacitated.

c. Finally, the Minnesota Supreme Court, like the trial court here (Pet. App. 6a), maintains that a statement cannot be testimonial if the declarant cannot comprehend its evidentiary or investigatory purpose. *Bobadilla*, 709 N.W.2d at 255-56. Since very young children (there, a three-year-old) "are simply unable to understand the legal system and the consequences of statements made during the legal process," their statements to child protection workers can never be testimonial. *Id.* at 256.[6]

3. Courts are not merely divided over the question presented; they are squarely in conflict. Of course, not every fact pattern, and not every child protection system, is identical. But the basics of each system, and the pertinent facts giving rise to the interviews in each case described above, are the same.

The *Bobadilla* case provides perhaps the starkest illustration of this reality. There, the Minnesota Supreme Court held the victim's statement to a child

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[6] The question whether and how *Crawford* takes the age of a declarant into consideration arises outside of the setting of child protection interviews as well. *Compare, e.g., State v. Siler*, 876 N.E.2d 534, 541-44 (Ohio 2007) (canvassing conflicting case law and deeming three-year-old's age irrelevant in holding that his statement to a police officer was testimonial), *with Lagunas v. State*, 187 S.W.3d 503, 519-20 (Tex. App. 2005) (deeming four-year-old's age highly significant in holding that his statement to a police officer was nontestimonial). Granting review in this case would allow this Court to give guidance on that broader issue as well.

protection worker was nontestimonial because the interview was focused on "protect[ing] the health and welfare of the child." *State v. Bobadilla*, 709 N.W.2d at 255. The Eighth Circuit granted the defendant habeas relief, holding that the Minnesota Supreme Court's decision was not only wrong, but that it constituted "an unreasonable application of clearly established Federal law" under AEDPA, 28 U.S.C. § 2254(d)(1) (internal punctuation omitted). In the Eighth Circuit's view, the witness's statements were clearly testimonial because the interview was designed in part to achieve a "purpose akin to a police investigation: assisting law enforcement with the investigation of a suspected criminal violation." *Bobadilla v. Carlson*, 575 F.3d at 793.

When the very same fact pattern produces such diametrically opposite analysis and results, there can be no doubt that courts are divided over the *law*, not facts, and that this Court's guidance is necessary.

II. The Question Presented Is Very Important.

As the Commonwealth itself emphasized below, the question presented is an "enormously important issue." Br. for Appellee in Pa. S. Ct. 2. This is so for at least three reasons.

1. The right to be confronted with one's accuser is one of the fundamental rights of the accused in a criminal trial. "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution." *Maryland v. Craig*, 497 U.S. 836, 847 (1990) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) (quoting in turn *Pointer v. Texas*, 380 U.S. 400, 404 (1965))). Confrontation

guarantees openness of procedure by "bringing the interrogation into the more neutral and public forum of the courtroom." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2548 (2009) (Kennedy, J., dissenting). It allows the jury to "observe the demeanor of the witness" as the witness accuses the defendant of wrongdoing. *Craig*, 497 U.S. at 846 (internal citation omitted). Finally, confrontation guarantees an opportunity for cross-examination, "the 'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367, at 29 (3d ed. 1940)).

2. This issue arises on a daily basis in courts across the country. States nationwide have adopted the child-protection-worker-as-interviewer model of investigating child abuse. *See* Am. Prosecutors Research Inst., Investigation and Prosecution of Child Abuse xxiii, xxx, 37 (3d ed. 2004). Furthermore, at least thirty-five states have special child hearsay statutes like Pennsylvania's, which render accusations made by children during such interviews admissible in lieu of live testimony so long as a court deems the statements "reliable" and deems the child "unavailable" to testify in court. *See Snowden v. State*, 846 A.2d 36, 39-40 n.7 (Md. Ct. Spec. App. 2004) (listing and categorizing forty such statutes); Br. Amicus Curiae of Missouri et al. at 2-3 n.1, *Iowa v. Bentley*, No. 07-886 (thirty-five statutes). While most states to consider the issue have determined that *Crawford* renders such accusations testimonial and therefore inadmissible absent the witnesses' taking the stand, *see supra* at 16-20, other states appear set on using such accusations as a substitute for live testimony – as they did during the

Roberts era – unless and until this Court squarely tells them that they cannot. *See supra* at 19-22.

3. Child accusations elicited during *ex parte* interviews are particularly in need of the adversarial testing that the Confrontation Clause guarantees. As this Court and others have recognized, "children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008); *see also Fowler v. Sacramento County Sheriff's Dep't*, 421 F.3d 1027, 1039 n.7 (9th Cir. 2005) ("We note further that fantasy by child witnesses is well-documented."); *Danaipour v. McLarey*, 386 F.3d 289, 298-99 (1st Cir. 2004) (noting that "statements by a young child, even if accurately recounted by an adult, may not reflect the truth" because of a child's desire for attention, repeated inquiry, and coaching); *Washington v. Schriver*, 255 F.3d 45, 57 (2d Cir. 2001) ("An emerging consensus in the case law relies upon scientific studies to conclude that suggestibility and improper interviewing techniques are serious issues with child witnesses.").

As a result, out-of-court accusations by child witnesses present a "special risk" of false convictions. *Kennedy*, 128 S. Ct. at 2663 (internal citation omitted); *see also* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 539 (2005) (convictions based on children's false accusations are "one major set of false conviction cases"); Bennett L. Gershman, *Child Witnesses and Procedural Fairness*, 24 Am. J. Trial Advoc. 585, 607 (2001) (modern child hearsay statutes "raise serious questions about . . .

whether innocent persons are more likely to be convicted of extraordinarily serious crimes"). This is especially so when other evidence corroborates the fact of the abuse but not the identity of the abuser, creating "a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement." *Idaho v. Wright*, 497 U.S. 805, 824 (1990). Confrontation is necessary in such a situation to "test[]" such statements in order "to tease out the truth." *Crawford*, 541 U.S. at 67.

To be sure, this Court has held that a state may relieve a young child of the ordinary obligation to testify *face-to-face* with the defendant, if such testimony would prove too traumatic. *See Craig*, 497 U.S. at 849-50. The Confrontation Clause might also permit other accommodations to protect child witnesses from undue distress. *See, e.g., Coronado v. State*, ___ S.W.3d ___, 2010 WL 1287039 (Tex. App. 2010) (holding that cross-examination of a three-year-old via written interrogatories asked during videotaped interview at a child advocacy center was "constitutionally sufficient" because the defendant was able to ask questions and the jury was able to observe the child's demeanor).

It is one thing, however, to allow a different method of confrontation when in-court testimony would cause a child witness emotional distress; it is wholly another to treat such predicted distress as a reason to dispense, as Pennsylvania and other states do, with *any* form of confrontation whatsoever – and to allow trial-by-*ex-parte*-interview instead. As this Court emphasized in *Craig*, the truth-seeking function of trial demands, at a minimum, that a

defendant have an opportunity to engage in *some* form of cross-examination, lest he lack any opportunity to "confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Craig*, 497 U.S. at 851 (internal quotation marks and citations omitted). Systems such as Pennsylvania's lack that essential safeguard.

III. This Case Is An Excellent Vehicle For Considering The Question Presented.

This case is an excellent vehicle for the Court to clarify how *Crawford* applies to children's statements to child protection workers investigating past abuse.

1. This case squarely raises the issue. In contrast to the only other petition this Court has reviewed since the conflict solidified, *Carlson v. Bobadilla*, 130 S. Ct. 1081 (2010) (denying certiorari), this case comes to the Court on direct review, and thus is free of any collateral review complications. And unlike *Iowa v. Bentley*, 552 U.S. 1275 (2008) (denying certiorari), which came to this Court on interlocutory review of a pretrial order, this case comes to this Court after a trial and conviction and, hence, with a complete record.

2. That this Court has already decided to hear another case involving *Crawford*'s testimonial concept during the October 2010 Term, *Michigan v. Bryant*, 768 N.W.2d 65 (Mich. 2009), *cert. granted*, 129 S. Ct. ____ (2010) (No. 09-150), makes this a particularly opportune time for this Court to take up this issue. This Court regularly grants certiorari during the same Term in two or more cases raising similar legal issues in different factual settings. It

did so, for example, this Term in three cases raising slightly different attacks on convictions under the "honest services" provision of the federal mail fraud statute. *See Black v. United States*, No. 08-876; *Weyhrauch v. United States*, No. 08-1196; *Skilling v. United States*, No. 08-1394. It also did so in two cases involving whether sentencing a juvenile to life in prison without the possibility of parole violates the Eighth Amendment. *See Graham v. Florida*, No. 08-7412; *Sullivan v. Florida*, No. 08-7621. And it did so four terms ago respecting *Crawford*'s testimonial concept itself. *See Davis v. Washington*, 547 U.S. 813 (2006) (consolidated opinion in *Davis* case and *Hammon v. Indiana*).[7] This practice allows this Court to engage in a more robust and nuanced

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[7] For other examples, see *Parents Involved in Seattle Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (whether race-based elements in public school assignment plans in Seattle and Louisville violate the Equal Protection Clause); *Van Orden v. Perry*, 545 U.S. 677 (2004), and *McCreary County, Ky. v. ACLU*, 545 U.S. 844 (2004) (whether Ten Commandments displays violate the Establishment Clause); *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (whether affirmative action in university admissions violates the Equal Protection Clause); *Ewing v. California*, 538 U.S. 11 (2003), and *Lockyer v. Andrade*, 538 U.S. 63 (2003) (whether applications of California's Three Strikes Law violated the Cruel and Unusual Punishment Clause); *Sutton v. United Air Lines*, 527 U.S. 471 (1999), and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (whether "correctable" disabilities are covered by Americans with Disabilities Act); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (whether employers are vicariously liable for sexual harassment under Title VII).

analysis of a legal doctrine, and thus to provide more comprehensive guidance to lower courts.

Hearing both *Bryant* and this case in the same term would allow this same kind of productive and efficient use of resources. The *Bryant* case involves whether statements a victim made to a police officer, minutes after being shot, were testimonial. The State of Michigan asserts that they were not, arguing that the declarant's need for medical treatment and the police's need to apprehend a violent perpetrator rendered the primary purpose of the statements assisting the police in meeting an ongoing emergency. In this case, the Pennsylvania Supreme Court held that the primary purpose of a calm interview with a witness to a suspected assault that occurred seven days before was to resolve an ongoing emergency. Addressing both of these arguments at the same time would enable this Court to give comprehensive guidance regarding the ongoing emergency concept.

At the same time, granting plenary review in this case would allow this Court to address the category of child protection worker interviews in a holistic manner. As the three different rationales advanced by the three Pennsylvania courts in this case illustrate, the ongoing emergency concept is just one of the three arguments courts deploy in assessing whether child protection worker interviews produce testimonial statements. State and federal courts are divided over the validity of each of the other two arguments as well. Some courts treat child protection workers' interviews as sufficiently tied to law enforcement and potential prosecutions to trigger *Crawford*, while others do not; some treat children the same as other witnesses, while others do not. *See*

supra at 16-23. This Court's ongoing emergency analysis in *Bryant* will not resolve these disagreements. Therefore, unless and until this Court squarely addresses the specific category of statements at issue here, state and federal courts will not be able to come to any agreement on this subject. Better for this Court to provide clarity on this frequently recurring and extremely important matter as soon as possible.[8]

IV. A Child's Statements During An Interview With A Child Protection Worker Investigating Past Abuse Are Testimonial.

This Court's precedent indicates that a child's statement to a child protection worker investigating allegations of abuse is testimonial.

1. In *Crawford*, this Court noted that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. 36, 50; *accord Mattox v. United States*, 156 U.S. 237, 242 (1895). And in *Davis* (and its companion case, *Hammon*), this Court explained that statements are testimonial when the "primary purpose" of a police interrogation is "to investigate a possible crime" – in other words, "to establish or prove past events potentially relevant to later criminal prosecution."

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[8] At the very least, this Court should hold this case pending the consideration of *Bryant* and dispose of it – either by granting certiorari or by granting, vacating, and remanding it – at the conclusion of those proceedings.

Davis, 547 U.S. at 822, 830. Applying that rule to the facts in *Hammon*, this Court held that a witness's statements to the police at the scene describing a just-completed domestic assault were testimonial.

A witness's statements made, as here, to a child protection worker investigating suspicions of past abuse are testimonial for the same reasons. As in *Hammon*, the interview is "an obvious substitute for live testimony." *Id.* at 830. The child witness does "precisely *what a witness does* on direct examination." *Id.* She recounts, in response to government questioning "some time after the events described [a]re over," "how potentially criminal past events began and progressed." *Id.* at 829-30. Indeed, whatever disagreements Members of this Court have had respecting the outer boundaries of the testimonial concept, it has remained common ground that statements of a "conventional witness" – that is, an eyewitness to the incident being investigated – are paradigmatically testimonial when they "respond[] to questions under interrogation" about the "events observed in the past." *Melendez-Diaz*, 129 S. Ct. at 2551-52 (Kennedy, J., dissenting); *compare id.* at 2534 (majority opinion).

2. None of the rationales that the Pennsylvania courts advanced in this case (which mirror the rationales other courts across the country have advanced) to hold that statements in child protection interviews are nontestimonial withstands scrutiny.

a. Contrary to the Pennsylvania Superior Court's holding (Pet. App. 67a) and Justice Baer's concurrence in the Pennsylvania Supreme Court (Pet. App. 51a), the fact that a government investigator is a child protection worker (or some similar kind of

social worker) instead of a police officer does not change the testimonial analysis.

An interview's investigative purpose, rather than the precise title or employing agency of the governmental questioner, is what renders a witness's statements during an interview testimonial. In *Crawford*, this Court noted that the right to confrontation developed in response to investigative interviews that magistrates conducted under the sixteenth-century Marian statutes. Magistrates "performed the investigative functions now associated primarily with the police," *Crawford*, 541 U.S. at 53, thereby raising "the danger of one-sided interrogations by adversarial government officials who might distort a witness's testimony." *Melendez-Diaz*, 129 S. Ct. at 2548 (Kennedy, J., dissenting). Child protection workers perform the same "investigative functions." As the child protection worker explained in this case: "I ha[d] allegations in front of me of serious bodily injury. I ha[d] to investigate and figure out what happened." Tr. 120 (9/19/05). Indeed, his investigation and interview was statutorily coordinated with police and prosecutors to such an extent that he acted as an "agent of law enforcement." Pet. App. 22a.

To be sure, a child protection worker also aims to ensure the safety and wellbeing of a child. But often, the role of a police officer is similarly two-fold: ensuring safety *and* investigating a past crime. Consider an officer (like the officer in *Hammon*) who is investigating a domestic assault. The officer seeks both to find out what happened and to protect the victim from future abuse. *Indeed, the chief method of ensuring the safety of a victim is often to arrest a*

suspect and to prosecute and imprison him for his criminal acts. Thus, in the context of investigating child abuse, as in the context of investigating domestic abuse and other crimes, interviews that governmental officials conduct to determine "how potentially criminal past events began and progressed" are sufficiently tied to potential prosecutions as to render their evidentiary products testimonial, even when a concurrent concern exists respecting the wellbeing of the victim. *Davis*, 547 U.S. at 830.

b. Nor is the Pennsylvania Supreme Court's majority opinion correct that the evidence-gathering function of a child protection worker's interview is irrelevant because such an interview is done to resolve an "ongoing emergency." Pet. App. 21a-23a.

In *Hammon*, a police officer interviewed a woman who seemingly had just been the victim of domestic violence. Her husband (the suspect) was in the next room. The police needed to find out what had just happened and "whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action." *Davis*, 547 U.S. at 841 (Thomas, J., concurring in the judgment and dissenting in part). But because Mrs. Hammon faced no "immediate threat to her person" during the interview, but rather gave a "narrative of past events . . . delivered at some remove in time from the danger she described," Mrs. Hammon's statements were testimonial. *Id.* at 830, 832 (majority opinion).

The same is true here. A child protection worker who interviews a potential witness to (or perpetrator of) child abuse is no doubt attempting in part to prevent "further harm" to the victim. Pet. App. 22a.

But when, at the time of the interview, no such harm is occurring, and the interviewer, as here, asks questions "to investigate and figure out what happened" in the past, Tr. 120 (9/19/05), the witness's statements are testimonial. *See Davis*, 547 U.S. at 829-32; *see also State v. Buda*, 949 A.2d 761, 785 (N.J. 2008) (Albin, J., dissenting) ("[A] narrative of a crime already committed that can be used in a future prosecution" is testimonial because it is not uttered "for the purpose of stopping a crime in progress."). Indeed, the incident under investigation here was much further removed in time and space than was true in *Hammon*. Finding an ongoing emergency in this case based upon a concern of possible future harm simply cannot be squared with *Hammon*.

c. Contrary to the trial court's assertion here (Pet. App. 6a), the fact that the declarant in a case such as this is a young child does not render her statements nontestimonial.

In light of the Confrontation Clause's rejection of using *ex parte* examinations in place of live testimony, *Crawford*, 541 U.S. at 50, a person's out-of-court statements must be testimonial when the statements "do precisely *what a witness does* on direct examination": recount, in response to questioning, "how potentially criminal past events began and progressed." *Davis*, 547 U.S. at 830. In other words, statements are testimonial when they "are an obvious substitute for live testimony." *Id.*

Nothing in this framework turns on the age of the witness. A child's statements in an interview with a child protection worker operate as a substitute for live testimony just as readily as an adult's statements in the same context would. And the risk

of governmental manipulation in the context of *ex parte* child interviews is at least as strong as with adults. Indeed, Members of this Court have emphasized "the value of the confrontation right" in the specific context of "guarding against a child's distorted or coerced recollections." *Melendez-Diaz*, 129 S. Ct. at 2548 (Kennedy, J., dissenting) (quoting *Craig*, 497 U.S. at 869 (Scalia, J., dissenting)).

Even if a witness's age were a factor that is relevant to testimonial analysis, that factor could not render a child's statements nontestimonial in the context of an interview with a child protection worker investigating past abuse. In such a setting, a child realizes that she is speaking to a person of authority who is trying to determine whether someone has done something "bad." The child also realizes "that some adverse consequences . . . w[ill] be visited on the wrongdoer," if that person is identified. Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 Brook. L. Rev. 241, 273 (2005). Here, for instance, A.A. remembered Geist as the person who had taken her away from her parents and into protective custody. She shook hands with Geist and spoke privately with him on the front porch. Pet. App. 3a, 20a. Regardless of whether a declarant in this situation understands the particularities of the American legal system, the person is knowingly performing the function of a witness. Any accusation she makes must be considered testimonial under the Confrontation Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 13, 2010

APPENDIX

APPENDIX A

SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

RICKY LEE ALLSHOUSE, JR.,
Appellant.

Argued March 4, 2009
Decided Dec. 29, 2009

BEFORE: CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, GREENSPAN, JJ.

OPINION

Justice TODD.

Ricky Lee Allshouse, Jr. appeals the April 18, 2007 order of the Superior Court of Pennsylvania, which affirmed the judgment of sentence imposed by the Jefferson County Court of Common Pleas following his convictions of simple assault[1] and endangering the welfare of a child.[2] For the reasons set forth below, we affirm.

On May 20, 2004, Appellant and M.R. ("Mother") were arguing in the home they shared with their three children. Appellant was shouting from the living room,

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[1] 18 Pa.C.S.A. § 2701(a)(1).

[2] 18 Pa.C.S.A. § 4304.

and Mother was in the kitchen. The couple's 7-month-old twin sons, J.A. and M.A., were in a playpen in the living room, and their 4-year-old daughter, A.A., was playing nearby. Mother's 8-year-old son, R.R., who also lived in the home, had already left for school. Mother reported to police that, at one point, she heard a "squeak" as Appellant sat on a recliner in the living room and, minutes later, she heard him get up from the recliner. She then heard J.A. crying. N.T. Trial, 9/19/05, at 46-47. As Mother ran to the living room, she passed Appellant, who was heading upstairs. Mother observed that A.A. was now in the playpen, holding J.A.'s head on her lap. When Mother picked up J.A., "his arm flopped backwards." *Id.* at 147. Mother took J.A. to the emergency room, where it was determined that he had suffered a spiral fracture to the right humerus caused by sharp and severe twisting of the arm.

Hospital officials immediately contacted Jefferson County Children and Youth Services ("CYS"), and CYS caseworker John Geist arrived at the hospital and spoke with Dr. Craig Burke, the emergency-room physician who treated J.A. Dr. Burke opined that the spiral fracture of J.A.'s arm indicated abuse. Geist then spoke with Mother, and advised her that J.A. would need to be removed from the family home pending investigation. Mother agreed that J.A. and his siblings would stay with their paternal grandparents.

On May 27, 2004, Appellant suggested to Geist that "possibly [A.A.] had caused injury to [J.A.]." N.T.

Hearing, 9/16/05, at 9.[3] Accordingly, that same day, Geist went to A.A.'s paternal grandparents' home to speak with A.A. Geist and A.A. sat and talked on the front porch of the house, while A.A.'s grandparents, siblings, and others were inside. During the interview, A.A. told Geist that Appellant had caused J.A.'s injury.[4] After his interview with A.A., Geist spoke with his supervisor, and the two agreed to arrange an evaluation of A.A. by Dr. Allen Ryen, a psychologist. Dr. Ryen interviewed A.A. on June 8, 2004, and during

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[3] *See also* N.T. Trial, 9/19/05, at 128 (Geist testified that he spoke with Appellant on May 27, 2004, at which time Appellant stated that he believed A.A. had caused J.A.'s injury).

[4] In response to direct examination by the district attorney, Geist described the events of the interview as follows:

> [Geist]: I had asked [A.A.] if she could remember her brother being hurt. She stated, yes, she did. I asked her if her other brother had caused the injury. She said no. I asked her if her mother caused it. She said no. I asked [her] if she caused it. She said no. I asked her if her father Ricky caused the injury. She got scared and kind of queasy and stated yes.
>
> Q: What did you physically observe to say she was afraid?
>
> [Geist]: She started shaking. Closed body language. She was looking around to see if anyone heard her statement.
>
> Q: All right. Go on. [Geist]: I asked her what she could recall, what happened to her brother. She stated that her father had done it. I asked her if she could remember how [J.A.] got the injury. She stated that—she put her hand on my arm and said [Appellant] grabbed her [sic] right above the elbow and pulled. I didn't get into much else with her because one of [Appellant's] brothers came outside, and she stopped talking.

N.T. Hearing, 9/16/05, at 11.

the interview, A.A. again implicated Appellant in J.A.'s injury.[5]

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[5] Dr. Ryen recounted his interview with A.A. concerning the incident with J.A., in response to questioning by the district attorney, as follows:

> [Dr. Ryen]: I'm not sure I can give you a specific quote, but I said something like did something happen to your brother or something kind of open-ended like that.
>
> Q: And can you tell the Court—what happened from there after you asked that question?
>
> [Dr. Ryen]: She immediately said to me, "Daddy hurt him." And I asked her more about that. She proceeded to describe her father had been, quote, mad and, quote, grabbed and yanked [J.A.'s] arm.
>
> Q: Did she explain what she meant by those statements?
>
> [Dr. Ryen]: I asked her what she meant, and, you know, I have a lot of properties in my office, and she demonstrated on the baby doll what she was talking about. And later on, I asked her some questions, and she had me demonstrate it on her. She was the baby doll, and I was the adult, and she showed me what I should do.
>
> Q: And was she leading you through it?
>
> [Dr. Ryen]: Yes.
>
> Q: Could you describe her demonstration to the Court?
>
> [Dr. Ryen]: Basically, you know, both. What she had me do was grab her by the elbow and kind of lift and twist at the same time. Kind of like that. She did that on the baby doll and instructed me if I went that way, it wasn't right. And I finally got it right.
>
> Q: And she told you that it was right?
>
> [Dr. Ryen]: Yes.
>
> Q: Did she describe at that point how the baby had reacted?
>
> [Dr. Ryen]: She said the baby began to cry and scream.

On June 11, 2004, Appellant was arrested and charged with aggravated assault, simple assault, endangering the welfare of a child, reckless endangerment, and harassment. On September 16, 2005, the trial court conducted a hearing pursuant to the Tender Years Hearsay Act ("TYHA"), 42 Pa.C.S.A. § 5985.1, to determine whether the statements given by A.A. to Geist and Dr. Ryen, admittedly hearsay, were admissible under the tender years exception to the hearsay rule.[6] Under the TYHA, certain out-of-court statements made by a child victim or witness may be admissible at trial if the child either testifies at the proceeding or is unavailable as a witness, and the court finds "that the evidence is relevant and that the time, content and circumstances of the statement

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> Q. And what else did she describe about her physical observations at that time?
>
> [Dr. Ryen]: That the baby wouldn't stop crying; that father tried to pick the baby up and get the baby to quiet down, but he wouldn't quiet down. And that some time later on—I'm not certain if the mother was someplace in the house—sometime later on, the mother took the baby to the hospital.

Id. at 31-32. In describing his interview, Dr. Ryen also noted that it was unusual that A.A. separated from her grandparents "without invitation" during the interview, and that after approximately ten minutes, A.A. was sitting on his lap and "kind of snuggling in." *Id.* at 29-30.

[6] Rule 802 of Pennsylvania's Rules of Evidence provides: "Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute." Pa.R.E. 802.

provide sufficient indicia of reliability." 42 Pa.C.S.A. § 5985.1(a)(1).

Analyzing the statements under *Crawford v. Washington*, 541 U.S. 36 (2004), the trial court first noted that A.A.'s statements to Geist and Dr. Ryen fell "in between" testimonial and nontestimonial statements "because we do have some questioning." N.T. Hearing, 9/16/05, at 61. The court explained, however:

> I'm going to find it's nontestimonial for these basis [sic]. I think we have to look at what an objective four-year-old of average intelligence would think. And Mr. Geist, as he appears today, he does not have on a uniform but carries a badge, but not a badge in the sense of police work.
>
> Dr. Ryen has a psychological appointment in the office to believe that later these statements would be used in Court. I certainly do not think for this four-year-old that she could make the determination that it would be available for use later at trial.

Id. at 61-62. The trial court determined that A.A.'s statements to Geist and Dr. Ryen satisfied the requirements of the tender years exception to the hearsay rule, and, under *Crawford*, would be admissible at trial.

On September 19, 2005, Appellant filed a motion for reconsideration, asserting A.A.'s statements constituted testimonial hearsay that was inadmissible under *Crawford*. Following argument, the trial judge denied the motion, reiterating his opinion that, in

determining whether questioning should be deemed testimonial in nature, "you have to look at it from the 4-year-old's point of view because the concern is reliability in that regard." N.T. Hearing, 9/19/05, at 3. On September 20, 2005, a jury convicted Appellant of simple assault and endangering the welfare of a child; he was acquitted of the remaining charges.

On November 2, 2005, Appellant was sentenced to one to two years in prison, plus fines, costs, and restitution. Appellant filed a post-sentence motion, and a hearing on the motion was held on January 12, 2006. On March 9, 2006, the trial court denied Appellant's motion to the extent he sought judgment of acquittal on his child endangerment conviction.[7] On April 3, 2006, Appellant appealed his judgment of sentence to the Superior Court, challenging, *inter alia*, the trial court's admission of A.A.'s statements to Geist and Dr. Ryen at trial.

With regard to the issues presently before this Court, the Superior Court agreed with the trial court that A.A.'s statements to Geist were nontestimonial in nature, and thus admissible under *Crawford*. The Superior Court concluded, however, that it could not determine, based on the record, whether A.A.'s statements to Dr. Ryen were testimonial because "it is impossible to determine what Dr. Ryen's primary purpose was in conducting the interview." *Commonwealth v. Allshouse*, 924 A.2d 1215, 1224 (Pa. Super. 2007). Nevertheless, the Superior Court opined that it was unnecessary to determine whether A.A.'s

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[7] The trial court granted Appellant relief in reversing a restitution award of $160 payable to CYS.

statements to Dr. Ryen were testimonial because, even if they were, admission of the statements was harmless error since Dr. Ryen's testimony was merely cumulative of other properly admitted testimony, and there was overwhelming "untainted evidence" to support the jury's verdict. *Id.* at 1224-25.

The Superior Court declined to address Appellant's additional argument that the trial court's application of the 2004 amended version of the TYHA, which provides that an out-of-court statement of a child victim or witness under age 12 is admissible at trial if, *inter alia*, the child is unavailable as a witness and the trial court determines the circumstances surrounding the statement provide sufficient indicia of reliability, violated the prohibition against ex post facto laws. The Superior Court determined that, even if it did, the trial court could have admitted A.A.'s statements as nontestimonial hearsay under *Ohio v. Roberts*, 448 U.S. 56 (1980), based on a finding that A.A.'s testimony contained particularized guarantees of trustworthiness. The Superior Court ultimately affirmed Appellant's judgment of sentence in a published opinion on April 18, 2007.

Thereafter, Appellant filed a petition for allowance of appeal, and, on October 22, 2008, this Court granted Appellant's petition with respect to the following issues:

1. Does the Superior Court's decision conflict with U.S. Supreme Court precedent on the confrontation clause thereby creating a direct conflict with another Superior Court decision?

2. Did the Superior Court disregard this Court's harmless error precedent by allowing the Commonwealth to discharge its burden of proving harmless error through a two-sentence footnote?

3. Did the Superior Court decision misconstrue the reach of *Ohio v. Roberts*, 448 U.S. 56 (1980), and thereby insulate Pennsylvania's Tender Years Hearsay Act from an *ex post facto* challenge?

Commonwealth v. Allshouse, 598 Pa. 600, 959 A.2d 903 (2008) (order). This Court heard oral argument in this matter on March 4, 2009.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This constitutional protection is known as the Confrontation Clause.[8] In 1980, the United States Supreme Court, in *Ohio v. Roberts*, *supra*, held that the Confrontation Clause did not bar admission of an unavailable witness's statement against a criminal defendant, provided the statement was surrounded by "adequate indicia of reliability." 448 U.S. at 66. Such indicia exist when the testimony being considered either fits within a "firmly rooted

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[8] The protection is expressly contained in Article 1, Section 9 of the Pennsylvania Constitution. Although Appellant notes in his brief that "Pennsylvania's constitution has the same confrontation language [as *Crawford*]," Appellant's Brief at 27 n.8, he presents no argument based on Article 1, Section 9. Thus, we express no opinion as to whether Appellant would be entitled to relief thereunder.

hearsay exception," or contains "particularized guarantees of trustworthiness." *Id.*

More than two decades after its decision in *Roberts*, the Supreme Court, in *Crawford v. Washington*, *supra*, overruled its *Roberts* decision. In doing so, the *Crawford* Court criticized the *Roberts* "indicia of reliability" test as a departure from the principles of the Confrontation Clause in two respects:

> First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Crawford, 541 U.S. at 60 (emphasis original). The *Crawford* Court explained that, while it had "no doubt that the courts below were acting in utmost good faith" when finding reliability,

> [t]he Framers . . . would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we

> do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts*' providing any meaningful protection in those circumstances.

Id. at 67-68.

Accordingly, the *Crawford* Court held the Confrontation Clause prohibits out-of-court *testimonial* statements by a witness, regardless of whether the statements are deemed reliable by the trial court, unless (1) the witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the witness:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. *Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.*

Id. at 68 (emphasis added).

The *Crawford* Court expressly declined, however, to explain the distinction between testimonial and nontestimonial statements, stating "[w]e leave for

another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* (footnote omitted).

Two years after the Supreme Court's *Crawford* decision, the Court had the opportunity to clarify the difference between testimonial and nontestimonial hearsay in *Davis v. Washington*, 547 U.S. 813 (2006). At issue in the consolidated appeal[9] in *Davis* were two separate statements. The first was a statement made by a victim of spousal abuse to a 911 operator; the second was a wife's statement to police officers dispatched to investigate a domestic disturbance, set forth in a battery complaint. In finding the statement to the 911 operator nontestimonial,[10] but the wife's statement to the police officers testimonial, the *Davis* Court set forth the following inquiries for determining whether statements are testimonial or nontestimonial:

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[9] Davis' appeal was consolidated with the case of *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005).

[10] In determining that the recording of the 911 call was not testimonial evidence, the *Davis* Court noted:

> If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in *Crawford* . . . , therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial."

Davis, 547 U.S. at 823 n.2.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. Thus, a statement is *nontestimonial* under the first *Davis* inquiry if it is made with the purpose of enabling police to meet an ongoing emergency. Conversely, a statement is *testimonial* under the second inquiry in *Davis* if: (1) it was made in absence of an ongoing emergency; and (2) the primary objective of the interrogation or questioning that resulted in the statement was to establish or prove past events. Collectively, these *Davis* inquiries are commonly referred to as the "primary purpose" test.

The Court acknowledged that the two inquiries described above were not exhaustive and did not address all possible scenarios—such as situations which do not involve interrogations—in which a determination of whether a statement is testimonial or nontestimonial is required, explaining:

> Our holding refers to interrogations because . . . the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate

> testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.

Id. at 822 n.1.

After *Crawford* and *Davis*, however, courts have struggled with the vitality of *Roberts* with regard to *nontestimonial* hearsay. As noted above, the *Crawford* Court suggested that nontestimonial hearsay statements might be exempt "from Confrontation Clause scrutiny altogether." 541 U.S. at 68. In *Davis*, the Court characterized *Roberts* as having been "overruled" and noted that the Confrontation Clause's focus on testimonial hearsay must be viewed as marking not merely its "core," but its perimeter. 547 U.S. at 824. Lastly, and most emphatically, in *Whorton v. Bockting*, 549 U.S. 406 (2007), the Court, in addressing the retroactivity of the *Crawford* decision, explained: "*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause." 549 U.S. at 419. Noting "*Crawford's* elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements," the Court sounded the death knell of *Roberts*:

> Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination

> could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.

Id. at 420.

These expressions notwithstanding, a number of courts, including the Third Circuit Court of Appeals, continue to apply the *Roberts* standard to determine the admissibility of nontestimonial hearsay statements. *See, e.g.*, *Albrecht v. Horn*, 485 F.3d 103, 134 (3d Cir. 2007) (admissibility of nontestimonial evidence governed by *Roberts*); *State v. Camacho*, 282 Conn. 328, 924 A.2d 99, 116 (2007) (stating that nontestimonial hearsay statements may still be admitted as evidence against an accused in a criminal trial if they satisfy both prongs of the *Roberts* test); *U.S. v. Myton*, 224 Fed. Appx. 125, 129 (2d Cir. 2007) (holding that the admissibility of nontestimonial, out-of-court statements are evaluated under the "two-part test" of *Roberts*).

Nevertheless, in the instant case, Appellant concedes that the threshold question is whether the statements are testimonial, because, if the statements are nontestimonial, "the confrontation clause places no restriction on their introduction except for the 'traditional limitations upon hearsay evidence.'" Appellant's Brief at 35 (citing *Davis*, 547 U.S. at 821). Thus, we turn to the merits of the issues on which we granted review.

Appellant first contends that the trial court, in admitting at trial the statements of A.A., who had not testified and was not cross-examined, violated his Confrontation Clause rights under *Crawford* and *Davis*. The trial court, in determining that A.A.'s statements to Geist and Dr. Ryen were nontestimonial,

> focused on the language quoted in *Crawford* that testimonial statements included those made under circumstances that would lead an objective witness reasonably to believe that his or her statement would be available for use at a later trial. The Court then concluded that an objective four-year-old of average intelligence and under the existing circumstances would not consider that her statements might later be used against [Appellant]. In fact, when he talked to [A.A.] on her own front porch, Geist was wearing blue jeans and never indicated to her his suspicions, the nature of his job, or her potential role as a witness against [Appellant]. Dr. Ryen also wore casual clothing and no badge of authority; he did not apprise [A.A.] of the purpose of their visit; and offered no indication that her statements could later be used in court. He then proceeded to engage [A.A.] in conversation and play that no typical four-year-old would interpret as being designed to elicit inculpatory information.

Trial Court Opinion, 5/5/06, at 4 (record citations omitted). We note that the trial court did not have the benefit of the United States Supreme Court's decision

in *Davis* at the time it authored its opinion, as *Davis* was decided on June 19, 2006.

The Superior Court did, however, have the benefit of *Davis*, and, in affirming the trial court's holding with respect to A.A.'s statement to Geist, opined that the language of *Davis*

> implies that a number of factors must *all* be considered in determining whether a statement is testimonial; the use of the word "and" indicates that both prongs of the test must be satisfied before a statement can be considered testimonial. In satisfying the first half of the *Davis* test by determining whether the statement being examined was given during an ongoing emergency, only one factor needs to be examined—the temporal relation of the statement being examined to the wrong the statement describes.
>
> Satisfying the primary purpose prong of the *Davis* test, in contrast, encompasses examination of two factors. The first factor that must be considered is the objective intent of the declarant and the objective intent of the questioner in giving and eliciting the statement being considered. Furthermore, the environment in which the statement was given, including the attendant formalities, must also be considered . . . . In sum, the Court's primary purpose test seems to be a variant of the totality of the circumstances test with parameters that are more specifically defined.

Allshouse, 924 A.2d at 1221 (citations omitted).

With regard to A.A.'s statements to Geist, the Superior Court then concluded:

> Examining the facts and circumstances of this interview leads us to the conclusion that A.A.'s statements are admissible as non-testimonial under *Crawford*, should a hearsay exception prove applicable.[11] While we recognize Geist conducted the interview a full seven days after the assault, the intentions of Geist and A.A. as well as the attendant environmental factors indicate A.A.'s statements are, indeed, non-testimonial in nature.
>
> Presently, appellant does not dispute Geist's contention that he only wanted to interview A.A. after appellant accused the young girl of harming J.A., and it would be absurd to assume A.A. had intended to give statements for use in a legal proceeding. Geist's failure to interview A.A. when he had her under his [exclusive supervision and control when he first transported A.A. and her siblings to their grandparents' home] also indicates Geist's contention is credible and, hence, there is little question Geist's primary purpose in interviewing A.A. was not to establish past

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[11] The Superior Court did not determine that a specific hearsay exception applied; rather, as noted in our discussion of the trial court's admission of A.A.'s statement to Geist under the amended version of the TYHA, *infra*, it concluded that the trial court could have admitted A.A.'s statements under *Roberts* based on a finding that they contained particularized guarantees of trustworthiness.

> events which would be potentially relevant in a criminal trial, but to ensure both A.A. and her siblings' welfare was secure while they remained in the custody of her grandparents. In addition thereto, Geist did not report A.A.'s statements to law enforcement but, rather, notified his CYS supervisor of them after the interview, even though he had the option of reporting the incident to the police.
>
> Furthermore, the environment surrounding the interview does not indicate A.A.'s statements were testimonial. As noted above, Geist was dressed casually and the interview was conducted on neutral ground. Additionally, Geist had no control over the interviewing environment—as his inquires were cut short after appellant's brother intervened. There was simply no semblance of formality during the interview.
>
> In sum, we do not view the Supreme Court's primary purpose test as being reliant solely on the temporal relationship between the statement and the wrong the statement describes and, instead, view the test as encompassing the broader range of factors applied in *Davis*. Inasmuch as this is the case, we conclude Geist's testimony is nontestimonial.

Allshouse, 924 A.2d at 122-23 (footnotes and citations omitted).

Predictably, Appellant contends that A.A.'s statements to both Geist and Dr. Ryen were testimonial under *Davis*. Appellant first asserts there

was no ongoing emergency, as any emergency that existed ended with J.A.'s removal from the family home on May 20, 2004. Appellant further maintains that the questions posed to A.A. by Geist on May 27, 2004 "were solely designed to have the child witness recreate past events," and that the "purpose associated with Dr. Ryen's interview was 100% investigative and 0% medicinal." Appellant's Brief at 41, 42. Finally, Appellant avers that, to the extent the formality associated with a statement should be considered, the circumstances surrounding A.A.'s statement to Geist—specifically, the fact that Geist introduced himself to A.A., asked her permission to speak with her, and shook her hand—support a conclusion that the purpose of the interview was investigative. *Id.* at 43.[12]

As noted above, in considering whether A.A.'s statement to Geist was testimonial under *Davis* the

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[12] A joint amicus brief was filed on behalf of Appellant by the Pennsylvania Association of Criminal Defense Lawyers, the Defender Association of Philadelphia, and the Public Defender Association of Pennsylvania (collectively, "Amici"). Amici argue that in applying the "primary purpose" test of *Davis*, a court is obligated to consider whether there existed "multiple primary purposes," and if even *one* of those purposes was to obtain information for use in a criminal investigation, the resulting statement must be deemed testimonial. Amicus Brief at 4. Amici further argue that "the structure of child witness interviewing in Pennsylvania and nationally demonstrates that forensic interviewing by nurses, social workers and medical personnel has the primary purpose of criminal investigation." *Id.* Finally, Amici maintain that "the test for excluding hearsay under *Crawford* and the Confrontation Guarantee does not vary with the age of the declarant." *Id.* at 5. In light of our determination that A.A.'s statement to Geist was nontestimonial under the first *Davis* inquiry, *see infra*, we do not address these arguments.

Superior Court considered the first of the two *Davis* inquiries—whether the statement was given during an ongoing emergency—and stated that it "recognize[d] Geist conducted the interview a full seven days after the assault." *Allshouse*, 924 A.2d at 122. However, the court further noted that there was "some question as to whether A.A. was being abused in some way by her grandparents and other members of the family and, therefore, an argument could be made that an ongoing emergency was present." *Id.* at 122 n.15 (emphasis omitted).

With regard to the second *Davis* inquiry, the Superior Court further concluded that A.A.'s statement to Geist was not testimonial because (a) Geist's intent during his interview with A.A. was not to obtain testimony for the purpose of a criminal proceeding, but to ensure the safety of J.A. and his siblings, and (b) the environment and circumstances surrounding A.A.'s statement were informal and not suggestive of an investigatory interview. Appellant, however, alleges that the Superior Court's application of the primary purpose test of *Davis* was flawed as a result of its "injection of the declarant's intent" into the factors considered under that test. Appellant's Brief at 54.

We conclude that A.A.'s statement to Geist was nontestimonial under *Davis* because it was given during an ongoing emergency. Specifically, we note that, although Appellant asserts that any ongoing emergency ended with J.A.'s removal from the family home on May 20, 2004, the validity of this assertion is premised on Appellant having caused J.A.'s injury. On May 27, 2004, however, Appellant told Geist that he

believed A.A. had caused J.A.'s injury. N.T. Trial, 9/19/05, at 128. It was thus incumbent upon Geist to immediately investigate the matter further, because, at that time, A.A. and J.A. were together in their grandparents' home, where A.A. could do further harm to J.A. Indeed, Geist interviewed A.A. the same day that Appellant told Geist he believed A.A. caused J.A.'s injury.

We recognize that the first inquiry under *Davis* contemplates that nontestimonial statements are those made in order "to enable police assistance to meet an ongoing emergency," and that Geist is not a police officer. As previously noted, however, the *Davis* Court construed the acts of 911 operators to be acts of the police on the basis that, even if 911 operators were not themselves law enforcement officers, they "may at least be agents of law enforcement when they conduct interrogations of 911 callers." *Davis*, 547 U.S. at 823. Similarly, we conclude that, in the instant case, Geist, who was contacted by hospital officials when J.A. was brought into the emergency room, and who was responsible for ensuring the safety of J.A. upon J.A.'s removal from the family home, should be construed to be an agent of law enforcement for purposes of a *Davis* analysis. *Cf. Commonwealth v. Ramos,* 367 Pa. Super. 84, 532 A.2d 465, 468 (1987) (per curiam) (in determining that a defendant should have been given Miranda warnings prior to questioning, while in police custody, by a CYS agent, the court noted that in fulfilling its purpose of providing protection for children from abuse, "CYS is not only a treatment agency, but is the investigating arm of the statewide system of Child Protective Services."). Under these

circumstances, we hold that A.A.'s statement to Geist was given in the context of an ongoing emergency, and thus, under *Davis* was nontestimonial. In light of our conclusion that the Superior Court properly determined A.A.'s statement to Geist was given during an ongoing emergency, and, therefore, was nontestimonial under the first inquiry in *Davis* we need not analyze A.A.'s statement under the second *Davis* inquiry, namely, whether the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution.

We next consider whether A.A.'s statement to Dr. Ryen was testimonial under *Davis*. Unlike A.A.'s statement to Geist, we cannot conclude that A.A's statement to Dr. Ryen was given during an ongoing emergency, as Dr. Ryen's interview with A.A. took place on June 8, 2004, nearly two weeks after Appellant suggested to Geist that A.A. may have been responsible for J.A.'s injuries. While we would thus need to address the second *Davis* inquiry with respect to A.A.'s statement to Dr. Ryen, we do not because we agree, as the Superior Court opined, that any possible error in admitting A.A.'s statement to Dr. Ryen was harmless because the statement was merely cumulative of A.A.'s statement to Geist, which we have concluded was properly admitted.

It is well settled that "an appellate court has the ability to affirm a valid judgment or verdict for any reason appearing as of record." *Commonwealth v. Parker,* 591 Pa. 526, 534-35, 919 A.2d 943, 948 (2007) (citing *Commonwealth v. Katze,* 540 Pa. 416, 658 A.2d

345 (1995) (Opinion in Support of Affirmance)). As we explained in *Commonwealth v. Thornton,*

> [t]he doctrine of harmless error is a technique of appellate review designed to advance judicial economy by obviating the necessity for a retrial where the appellate court is convinced that a trial error was harmless beyond a reasonable doubt. Its purpose is premised on the well-settled proposition that "[a] defendant is entitled to a fair trial but not a perfect one."

494 Pa. 260, 266, 431 A.2d 248, 251 (1981). This Court may affirm a judgment based on harmless error even if such an argument is not raised by the parties.[13]

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[13] Appellant argues that the Superior Court improperly engaged in a harmless error analysis with regard to the admissibility of A.A.'s statement to Dr. Ryen because the Commonwealth failed to provide sufficient argument in support of a finding thereof. Specifically, Appellant avers that the Commonwealth's only mention of the concept of harmless error was contained in a two-sentence footnote in its brief to the Superior Court, Appellant's Brief at 74, and that the Commonwealth argued that any error in the admission of A.A.'s statement to Geist would be harmless error if A.A.'s statement to Dr. Ryen was deemed properly admitted because the statement given to Dr. Ryen was more detailed, and Geist's testimony would be cumulative of Dr. Ryen's testimony.

First, the discrepancy as to which statement was alleged to be cumulative of another is immaterial to the issue of whether the Superior Court improperly engaged in a harmless error analysis in the first instance. Furthermore, in *Commonwealth v. Katze,* 540 Pa. 416, 658 A.2d 345 (1995) (Opinion in Support of Affirmance), three Justices agreed that the Commonwealth did not waive its right to argue harmless error before the Superior Court by failing to first raise the issue before the trial court on

We agree with the Superior Court that any error in the admission of A.A.'s statement to Dr. Ryen was harmless error because the statement was merely cumulative of the statement A.A. made to Geist. Indeed, the substance of A.A.'s statements to Dr. Ryen and Geist was the same: A.A. indicated to both Geist and Dr. Ryen that Appellant had hurt J.A. by grabbing and pulling on J.A.'s arm. Accordingly, Appellant is not entitled to relief based on his claim that A.A.'s statement to Dr. Ryen was improperly admitted.

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the defendant's motion for a new trial:

> There is a general rule that issues not raised in the lower court may not be addressed on appeal; however, this rule is applicable only to appellants. The Commonwealth in the instant matter was not the appellant before the trial court, where the waiver is alleged to have occurred; therefore, it could not have waived any issues. Appellant cites several cases in support of its proposition that the Commonwealth waived its right to argue harmless error; however, in all of the cases cited, the party deemed to have waived an issue was the appellant. The Commonwealth, as the non-moving party before the trial court in the instant matter, had no obligation to preserve issues at the post-trial stage in the appeal process. Therefore, it was permitted to raise the issue of harmless error before the Superior Court.

540 Pa. at 425, 658 A.2d at 349 (footnote and citation omitted). In the case *sub judice,* the Commonwealth was not the moving party before the trial court or the Superior Court, and, therefore, had no obligation to preserve any claim of harmless error. Moreover, it was within the Superior Court's discretion to affirm the judgment against Appellant for any reason. Accordingly, we reject Appellant's argument that the Superior Court erred in engaging in a harmless error analysis.

Having determined that A.A.'s statement to Geist was nontestimonial under *Davis*, and thus not subject to the protections of the Confrontation Clause, we now address Appellant's argument that the trial court's admission of the statement as a hearsay exception under the current version of the TYHA constituted an ex post facto violation.[14] Instantly, the trial court found A.A.'s statements to Geist and Dr. Ryen admissible under the tender years hearsay exception. The current version of the TYHA, which became effective on July 15, 2004, provides:

> (a) General rule.—An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:
>
> (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

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[14] Appellant makes the same argument with respect to A.A.'s statement to Dr. Ryen, but as we have concluded that any error in admitting A.A.'s statement to Dr. Ryen was harmless, we need only address his claim concerning Geist. Regardless, the analysis *infra* applies to both statements.

(2) the child either:

(i) testifies at the proceeding; or

(ii) is unavailable as a witness.

42 Pa.C.S.A. § 5985.1(a) (amended 2004).

At the time J.A. was injured in May 2004, however, the prior version of the TYHA was still in effect, and provided:

> (a) General rule.—An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing physical abuse, indecent contact or any of the offenses enumerated in 18 Pa.C.S. Ch. 31 (relating to sexual offenses) *performed with or on the child by another*, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal proceeding if:
>
> (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) the child either:
>
> (i) testifies at the proceeding; or
>
> (ii) is unavailable as a witness.

42 Pa.C.S.A. § 5985.1(a) (2000) (emphasis added). The amended version thus eliminated the requirement that the offense be "performed with or on the child." Appellant argues that the trial court's admission at trial, under the amended version of the TYHA, of

A.A.'s statements to Geist and Dr. Ryen, that did not describe abuse performed *with or on A.A.*, constituted a violation of the prohibition against ex post facto laws contained in both the United States and Pennsylvania Constitutions.[15]

Preliminarily, we note that the ex post facto clauses of the United States and Pennsylvania Constitutions are virtually identical in language, and the standards applied to determine ex post facto violations under both constitutions are comparable. *Commonwealth v. Young*, 536 Pa. 57, 65 n.7, 637 A.2d 1313, 1317 n.7 (1993) (holding that analysis of the appellant's federal ex post facto claim disposed of his state claim as well). The ex post facto clause of the United States Constitution provides: "No State shall . .

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[15] Appellant, who was not charged with any sexual offenses, apparently interprets the phrase "performed with or on the child by another," as contained in the prior version of the TYHA, as modifying all the crimes listed. *See* Appellant's Brief at 63 ("The evidence, however, does not show any act by Allshouse which was 'performed with' or 'on the child' witness."). In the prior version of the TYHA, however, the phrase "performed with or on the child by another" arguably could be read to apply **only** to sexual offenses; under such a reading, the portion of the TYHA relevant to the instant case would have been the same under both versions of the TYHA, since both versions would have permitted out-of-court statements made by a child witness, age 12 or younger, describing physical abuse. In that (1) the Commonwealth does not challenge Appellant's argument in this regard; (2) the prior version of the TYHA is no longer in effect; and (3) we conclude, for the reasons discussed *infra*, that application of the amended version of the TYHA does not violate the prohibition against ex post facto laws regardless, it is unnecessary for us to engage in a statutory construction analysis to determine whether Appellant's interpretation is correct.

. pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10. The ex post facto clause of the Pennsylvania Constitution provides: "No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." Pa. Const. art. I, § 17.

A law violates the ex post facto clause of the United States Constitution if it (1) makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) aggravates a crime, or makes it greater than it was when committed; (3) changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; or (4) alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense in order to convict the offender. *Carmell v. Texas*, 529 U.S. 513, 522 (2000) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)); *Young*, 536 Pa. at 65-66, 637 A.2d at 1317 (assertion of an ex post facto violation based on the third prong of *Calder*).

Appellant maintains that application of the amended version of the TYHA in his case violated the fourth *Calder* prong because "[t]he evidence received at trial was *different* than what would have been received back in May, 2004." Appellant's Brief at 71 (emphasis original). In denying Appellant relief on his ex post facto claim, the Superior Court reasoned:

> The trial court, by applying the [TYHA] to the current controversy, was required to find A.A.

was unavailable and was also required to find indicia of reliability. 42 Pa.C.S.A. § 5985.1. The record demonstrates the indicia of reliability ultimately found by the trial court was not the Tender Years Hearsay Act itself, in accordance with the aspect of the *Roberts* definition that allows reliability to be found in a "firmly rooted hearsay exception."

[Rather], the trial court's finding of reliability, which was not in the form of a "firmly rooted hearsay exception" and was premised on a finding of "particularized guarantees of trustworthiness," satisfies *Roberts*, which was binding precedent when appellant was charged and remains binding precedent in analyzing the admission of non-testimonial hearsay today. Thus, even if we assume arguendo the trial court's application of the Act constitutes an *ex post facto* violation, this application is inconsequential, as the trial court simply could have applied *Roberts* and reached the identical result. There is no reason to reverse and remand, as the trial court could simply reach the same result by stating that it is applying *Roberts*.

Commonwealth v. Allshouse, 924 A.2d at 1226-27 (footnote omitted). We hold that Appellant is not entitled to relief on the basis of his ex post facto claim, albeit for different reasons than relied upon by the Superior Court.[16]

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[16] The Superior Court, in concluding that A.A.'s statements were admissible as nontestimonial hearsay under *Roberts* based on the

The United States Supreme Court addressed the issue of ex post facto laws regarding rules of evidence in *Hopt v. Utah*, 110 U.S. 574 (1884). In *Hopt*, the appellant committed a murder at a time when the law precluded a particular class of witnesses—namely, convicted felons—from testifying at trial. By the time of the appellant's trial, however, this law had been repealed, and the trial court allowed a witness who was incarcerated on murder charges to testify at the appellant's trial. In holding there was no violation of the prohibition against ex post facto laws, the Court stated:

> Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefore than was prescribed at the time of its commission, nor do

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trial court's finding that the testimony contained particularized guarantees of trustworthiness, did not recognize that, even if A.A.'s statements were admissible on this basis under federal constitutional law, the statements might nonetheless be inadmissible under Pennsylvania's rules of evidence, which rules prohibit the admission of hearsay "except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute." Pa.R.E. 802. As a result of our conclusion that the trial court's application of the amended TYHA did not violate the ex post facto clause of either the United States or Pennsylvania Constitution, however, we need not address this matter further.

> they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed. The crime for which the present defendant was indicted, the punishment prescribed therefore, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged.

Hopt, 110 U.S. at 589-90.

Similarly, in *Thompson v. Missouri*, 171 U.S. 380 (1898), the appellant alleged an ex post facto violation

when evidence consisting of a handwriting comparison, which was inadmissible at the time the crime was committed and at the appellant's first trial, was used in a second trial at which the appellant ultimately was convicted. The Supreme Court rejected the appellant's argument using language similar to that used in *Hopt*:

> [W]e adjudge that the statute of Missouri relating to the comparison of writings is not *ex post facto* when applied to prosecutions for crimes committed prior to its passage. if persons excluded upon grounds of public policy at the time of the commission of the offense, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed. The Missouri statute, when applied to this case, did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offense criminal that was not criminal at the time he committed the murder of which he was found guilty. It did not change the quality or degree of his offense. Nor can the new rule introduced by [it] be characterized as unreasonable; certainly not so unreasonable as materially to affect the substantial rights of one

> put on trial for crime. The statute did not require "less proof, in amount or degree," than was required at the time of the commission of the crime charged upon him. It left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state, as a condition of its right to take the life of an accused, must overcome the presumption of his innocence, and establish his guilt beyond a reasonable doubt . . . . The statute did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused . . . . We cannot adjudge that the accused had any vested right in the rule of evidence which obtained prior to the passage of the Missouri statute, nor that the rule established by that statute entrenched upon any of the essential rights belonging to one put on trial for a public offense.

Thompson, 171 U.S. at 386-88.

Most recently, in *Carmell*, *supra*, the Supreme Court considered an ex post facto challenge to a Texas law, an amendment to which altered the rules of evidence for crimes committed prior to the amendment. The appellant in *Carmell* was convicted in 1996 on 15 counts of committing sexual offenses against his stepdaughter. The offenses were committed between 1991 and 1995, when the victim

was between 12 and 16 years old. Prior to September 1, 1993, Art. 38.07 of the Texas Code of Criminal Procedure specified that a victim's testimony regarding a sexual offense could not support a conviction unless (1) corroborated by other evidence or (2) the victim informed another person of the offense within six months of its occurrence (an "outcry"). However, if the victim was under age 14 at the time of the offense, the victim's testimony alone could support a conviction. The original version of Article 38.07 read:

> A conviction under Chapter 21, Section 22.011, or Section 22.021, Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within six months after the date on which the offense is alleged to have occurred. The requirement that the victim inform another person of an alleged offense does not apply if the victim was younger than 14 years of age at the time of the alleged offense.

Carmell, 529 U.S. at 517, quoting Tex. Code Crim. Proc. Ann. art. 38.07 (1983). Subsequently, a 1993 amendment to the code of criminal procedure allowed a conviction based on the victim's testimony alone if the victim was under age 18.

Carmell appealed his convictions on four of the counts, arguing that the convictions could not stand under the pre-1993 version of the law in effect at the time the crimes were committed because the convictions were based solely on the testimony of the victim, who was not under 14 at the time of the

offenses and had not made a timely outcry. The Texas Court of Appeals, citing *Hopt*, *supra*, held that applying the 1993 amendment retroactively did not violate the ex post facto clause of the United States Constitution because it did not increase the punishment or change the elements of the offense the state had to prove; rather, it merely removed certain restrictions on the competency of certain classes of persons as witnesses, and, thus, was simply a rule of procedure. *Carmell*, 529 U.S. at 520. Recognizing a conflict in decisions regarding the retroactive application of a statute repealing a corroboration requirement, the United States Supreme Court granted review, and, in a 5-4 decision, reversed the Texas Court of Appeals.

The Court first emphasized that "Texas courts treat Article 38.07 as a sufficiency of the evidence rule, rather than as a rule concerning the competency or admissibility of evidence." *Id.* at 518 n.2. After acknowledging the four categories of ex post facto laws set forth in *Calder* and discussed above, the Court noted that a law that alters the legal rules of evidence, and allows for the receipt of less, or different testimony than the law required at the time of the commission of the offense in order to convict the offender, constitutes the fourth type of ex post facto law set forth in *Calder*. With respect to the merits of the case before it, the Court concluded:

> Article 38.07 is unquestionably a law "that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Under

> the law in effect at the time the acts were committed, the prosecution's case was legally insufficient and petitioner was entitled to a judgment of acquittal, unless the State could produce both the victim's testimony and corroborative evidence. The amended law, however, changed the quantum of evidence necessary to sustain a conviction; under the new law, petitioner could be (and was) convicted on the victim's testimony alone, without any corroborating evidence. Under any commonsense understanding of *Calder*'s fourth category, Article 38.07 plainly fits. Requiring only the victim's testimony to convict, rather than the victim's testimony plus other corroborating evidence is surely "less testimony required to convict" in any straightforward sense of those words.

Carmell, 529 U.S. at 530 (emphasis omitted).

After careful consideration, we find *Carmell* distinguishable, and we conclude that the amended version of the TYHA at issue in the instant case is more akin to the laws challenged in *Hopt* and *Thompson*, and we conclude, as did the Supreme Court in those cases, that application of the amended version of the TYHA does not constitute a violation of the United States or Pennsylvania ex post facto clauses. The TYHA is not a sufficiency rule, as it does not address the type of evidence sufficient to support a conviction. Unlike the amendment to Art. 38.07 of the Texas Code of Criminal Procedure challenged in *Carmell*, which altered the specific requirement that the State produce evidence of both the victim's

testimony and corroboration *in order to convict* a defendant, the amended version of the TYHA in the instant case did not alter the evidence the Commonwealth was required to prove in order to convict Appellant. A.A.'s testimony, though potentially helpful, was not an essential element of the Commonwealth's case against Appellant. Indeed, evidence consisting of the testimony of Mother and the emergency room physician, though circumstantial, arguably was sufficient to support Appellant's conviction. The amended version of the TYHA simply *expanded* the class of persons whose out-of-court statements are admissible in court, from a victim or witness, age 12 or younger, on or with whom an offense was performed by another, to a victim or witness, age 12 or younger. In eliminating the requirement that the offense had to be performed "with or on the child by another," the amended version of the TYHA "simply enlarge[d] the class of persons who may be competent to testify in criminal cases." *Hopt*, 110 U.S. at 589. Unlike in *Carmell*, the amendment did not allow Appellant to be convicted on less, or different evidence.[17] Thus, we reject

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[17] *See, e.g.*, *Commonwealth v. McElhenny*, 329 Pa. Super. 240, 478 A.2d 447 (1984), wherein the Pennsylvania Superior Court relied on both *Hopt* and *Thompson* to reject the appellant's challenge to the sentence imposed after he was convicted of third-degree murder. Appellant argued that the admission of certain evidence at trial, namely, a tape recording of a 911 telephone call made by the appellant in which he made incriminating statements, violated the ex post facto clause of the United States and Pennsylvania Constitutions. Under the law at the time the call was recorded, the recording, although legally made, could not be used as evidence in court, absent the appellant's written consent. By the time of trial, however, that law had been

Appellant's argument that the trial court's admission at trial of A.A.'s statement to Geist violated the prohibition against ex post facto laws.

For all of the reasons set forth above, we affirm the order of the Superior Court.

Justice McCAFFERY did not participate in the consideration or decision of this case.

Chief Justice CASTILLE and Justices SAYLOR and EAKIN join the opinion.

Justice SAYLOR files a concurring opinion in which Chief Justice CASTILLE joins.

Justice BAER files a concurring opinion in which Justice GREENSPAN joins.

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repealed, and a new law, under which the recording was admissible irrespective of the appellant's consent, was in effect.

> In rejecting the appellant's ex post facto claim, the Superior Court acknowledged that the law in question altered the legal rules of evidence to allow the admission of different evidence, but emphasized that the law did not alter the evidence necessary to *convict* the offender. That is, it did not change the legal definition of the crime; it did not change the prohibited behavior or what the state had to show to prove the commission of the crime. That must be the focus of our enquiry and it did not occur here.

Id. at 449 (internal citation omitted, emphasis original).

Justice SAYLOR, concurring.

I join the majority opinion.

My only addition is to highlight the tension between the testimonial litmus of *Crawford v. Washington*, 541 U.S. 36 (2004), and the plain terms of the Sixth Amendment. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"). The many open questions in the wake of the immense shift in Confrontation Clause jurisprudence heralded by *Crawford* leaves lower-tier federal courts and state courts in a difficult position in terms of predicting the appropriate limits of this critical Sixth Amendment provision, as newly construed. *Accord* Michael H. Graham, 30B FED. PRAC. & PROC. EVID. § 7033 (2009).

I credit the majority opinion for doing the best job possible in such circumstances.

Chief Justice CASTILLE joins this concurring opinion. Justice BAER, concurring.

I join the Majority with the exception of the following points. The Majority applies the primary purpose test from *Davis v. Washington*, 547 U.S. 813 (2006), to conclude that because Geist, a social worker, was confronting an ongoing emergency when he interviewed Appellant's four-year old daughter, A.A., the statements elicited from A.A. are nontestimonial. While I agree that the statements elicited from A.A. are nontestimonial, my conclusion derives from my belief that, in this context, we should not consider

Geist an agent of law enforcement. Because I do not view him as an agent of law enforcement, I find it unnecessary to consider whether he was investigating an ongoing emergency.

The resolution of the admissibility of A.A.'s statements to Geist turns on whether her statements are testimonial. To make this determination we must consider the explanation of testimonial statements in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis*. In *Crawford*, following the arrest of the defendant, police detectives interrogated him and his wife and obtained their statements regarding an earlier stabbing. The question before the Supreme Court was whether, when the wife refused to testify at the defendant's trial, the state could introduce her statement to police to contradict the defense. The defendant argued that admission of his wife's statement, absent her testimony, violated the Sixth Amendment's Confrontation Clause, which guarantees the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Addressing this argument, the Court reviewed the original meaning of the Confrontation Clause and concluded that its history suggested two inferences. *Id.* at 50.

First, that the principal evil at which the Confrontation Clause was directed was a specific form of hearsay deriving from criminal procedure in civil-law countries: *ex parte* examinations of witnesses by justices of the peace and other officers eventually introduced as evidence against the accused. Consequently, the Court noted that not all hearsay implicates the Sixth Amendment's core concerns. *Id.* at

51. Rather, the text of the Confrontation Clause applies to "witnesses" against the accused—witnesses being "those who bear testimony." *Id.* at 51 (citing 2 N. Webster, An American Dictionary of the English Language (1828)). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* According to the Court, various formulations of this core class of "testimonial" statements exist:

> *[E]x parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . . Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

Id. at 51-52 (citations omitted). The Court further noted that the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . ." *Id.* at 56 n.7. The Court found that unsworn statements taken by police officers in the course of interrogations are testimonial under even a narrow standard. *Id.* at 52.

The second inference suggested by the history of the Confrontation Clause was that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. *Id.* at 53-54. The *Crawford* Court ultimately held that the defendant's wife's statements made during a police interrogation were testimonial hearsay that could not be admitted at the defendant's trial unless the declarant was unavailable and the defendant had a prior opportunity to cross examine her. *Id.* at 68.[18]

Finding a statement testimonial is, therefore, pursuant to *Crawford*, a threshold determination in assessing the statement's admissibility, triggering the demands of the Confrontation Clause. Although the Court left for another day any effort to spell out a comprehensive definition of "testimonial," *id.* at 68, it identified certain statements as the functional equivalent of "*ex parte* in-court testimony": those provided in affidavits, *id.* at 51; depositions, *id.* at 52; those given during police interrogations, *id.* at 68; prior testimony at a preliminary hearing, before a grand jury, or at a former trial, *id.* at 68; or similar

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[18] The Court overruled *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which conditioned the admissibility of all hearsay evidence on whether it fell under a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Crawford*, 541 U.S. at 60. The Court found that this test was, in certain circumstances, too broad, because it applied the same analysis regardless of whether the hearsay consisted of *ex parte* testimony, thereby requiring close constitutional scrutiny of nontestimonial statements far removed from the core concerns of the Confrontation Clause.

"statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . ." *Id.* at 52.[19] In this core class of testimonial statements, the declarant reasonably believes that he is bearing testimony against the accused for use in a subsequent proceeding. In contrast, nontestimonial hearsay statements are not inadmissible in accord with the constraints of the Confrontation Clause because the declarant does not intend to bear testimony against the accused.

Although the Court in *Crawford* indicated that all statements made during police interrogations are testimonial, 541 U.S. at 52, the Court was asked to reconsider this absolute characterization in *Davis* and *Hammon v. Indiana*, the companion case. In *Davis*, the declarant provided statements to a 911 operator, and in *Hammon*, the declarant made statements to police who responded to a reported domestic disturbance at her home. The Court was called upon to decide whether the statements made in these two circumstances were testimonial and thus subject to the requirements of the Confrontation Clause. The Court distinguished between nontestimonial and testimonial statements made during police interrogation:

> Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to

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[19] Commentators have referred to this definition as the "objective-witness test." *See, e.g.*, Christopher Cannon Funk, *The Reasonable Child Declarant After* Davis v. Washington, 61 Stan. L. Rev. 923 (2009)

police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822.[20] The *Davis* Court assumed that the acts of the 911 operator were the acts of the police, making it unnecessary to decide whether and when statements made to someone other than law enforcement personnel are testimonial. *Id.* at 823, n.2.

Applying the above test to the facts of the two cases before it, the Court ultimately concluded that statements to the 911 operator in *Davis* were nontestimonial because they were provided during police interrogation to meet an ongoing emergency. The Court found, however, that the statements to

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[20] Commentators have referred to this standard as the "primary purpose test." *The Reasonable Child*, 61 Stan. L. Rev. at 935.

If the primary purpose is to meet an ongoing emergency, the statement is nontestimonial; if there is no ongoing emergency and the primary purpose is instead to establish past events, then the statement is testimonial. *Davis*, 547 U.S. at 822.

police investigating a crime in *Hammon* were, in fact, testimonial, because they were provided as part of an investigation into possibly criminal past conduct. *Id.* at 829. In reaching this conclusion, the Court indicated that formality is essential to testimonial utterance, *id.* at 830, n.5, noting that after the declarant in *Hammon* provided her statements to the police, she executed an affidavit to establish the past events. *Id.* at 832.

The test provided in *Davis*, which requires a determination of the primary purpose of the police interrogation that produced the statements sought to be admitted, is limited on its face to police interrogations; the primary purpose test has no application to statements that are not made in the course of police interrogations. *See Davis*, 547 U.S. at 822. If statements are made to someone other than law enforcement, we should look to the principals of *Crawford* to determine the testimonial nature of the statements. *See, e.g., State v. Stahl,* 855 N.E.2d 834 (Ohio 2006) (applying *Crawford*'s "objective witness" test, rather than *Davis*'s "primary purpose" test, to find that statements made by an adult rape victim to a nurse practitioner were nontestimonial).

Although the primary purpose test easily classifies some statements as testimonial, its use is more problematic in the context of child abuse cases, which usually involve law enforcement, social workers, health care professionals, counselors, and family or friends. In fact, the difficulty of determining the testimonial nature of a statement obtained in a child abuse case contrasts with the relatively straightforward application of *Crawford* and *Davis* to police interrogations. Accordingly, I would not automatically

determine that statements made by a child during the course of a child abuse investigation are testimonial unless made during an ongoing emergency solely due to the involvement of a government agent in the interview process. *See, e.g.*, *People v. Vigil*, 127 P.3d 916, 923-25 (Colo. 2006) (finding that a doctor working for a child protection team who obtained statements from a child was not a government agent "absent a more direct and controlling police presence"); *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006) (holding that the question of whether statements made by a young child to a child protection worker are testimonial does not hinge on whether the worker was a government agent, but rather on whether the government agent was acting to a "substantial degree" to produce statements for trial). I believe that in the absence of police interrogation, our inquiry should examine the extent to which the questioner is acting at the behest of or in conjunction with law enforcement. In this regard, an important consideration in this case is the degree of police involvement in procuring the statements from A.A.

Before looking at the facts of this case, however, it is helpful to understand how Geist's interview came about pursuant to the Child Protective Services Law, 23 Pa.C.S. §§ 6301 *et seq.* The Law's purpose is to involve law enforcement agencies in responding to child abuse, to establish children and youth social service agencies to investigate reports of abuse, to provide protection for children from further abuse, and to provide rehabilitative services for the children and parents involved. 23 Pa.C.S. § 6302(b). The Law requires certain individuals to report suspected abuse,

including physicians. 23 Pa.C.S. § 6311(b). Once a report of suspected abuse is received, the county CYS must commence an investigation, which includes a determination of the risk of harm to the child or children if they continue to remain in the home environment, as well as a determination of the nature, extent, and cause of any abuse, and to take any action necessary to provide for the safety of the child or children. 23 Pa.C.S. § 6368. Although CYS workers may release information to the police, there is no requirement that they do so. *See* Pa.C.S. §§ 6339 and 6340.

Turning to the facts of this case, the circumstances reveal that the police were not involved in procuring A.A.'s statements to Geist. After Appellant injured his seven-month old son, J.A., the infant was treated at the hospital. The treating physician, who suspected physical abuse, contacted CYS social worker Geist. Geist responded to the hospital, where he interviewed J.A.'s mother, and concluded that J.A. and his siblings, including four-year-old A.A., should be removed temporarily for their safety. The children were placed with Appellant's parents. Appellant informed Geist that A.A. caused J.A.'s injury. Acting on this information, Geist arrived at Appellant's parents' home to talk to A.A. on May 27, 2004, a week after the children's removal from their parents' care. Geist intended to obtain information regarding J.A.'s injury. Geist was casually dressed, and did not indicate that A.A.'s statements would be used in a subsequent proceeding against Appellant. He questioned her on the front porch, and asked her how she was and if she remembered what happened to J.A. She said that she did; Geist asked if J.A.'s twin caused the injury, and

A.A. said no. He asked in turn whether A.A. caused the injury, whether her mother did, and whether her father did. When the questioning turned to her father, Appellant, A.A. began to act scared, and answered in the affirmative. She described Appellant as angry at the time, and demonstrated how the injury occurred. When one of Appellant's siblings interrupted, the interview ended. Geist returned to CYS, followed statutory procedure by notifying his supervisor, and recommended that A.A. be interviewed by Dr. Ryen. *See* 23 Pa.C.S. § 6311. He did not report his findings to law enforcement.

I do not believe that Geist was acting at the behest of or in conjunction with law enforcement. Police were not involved in Geist's interview of A.A., either formally or behind the scenes. There is no evidence that the police requested Geist's interview of A.A., provided any direction about the questioning, or had any input whatsoever. As the Superior Court noted, Geist did not notify the police of what he learned from his interview of A.A. Rather, he contacted his supervisor. Geist was acting pursuant to a statutory duty to ensure the safety of A.A. and her siblings.

The Majority presently applies the primary purpose test to the interrogation conducted by Geist, explaining such application by construing Geist to be an agent of law enforcement. To reach this conclusion, the Majority relies on *Commonwealth v. Ramos,* 367 Pa. Super. 84, 532 A.2d 465, 468 (1987). I find *Ramos* distinguishable on its facts. In *Ramos*, a CYS caseworker obtained a confession from a defendant during an interview while the defendant was in prison awaiting trial on criminal charges for the child abuse

that prompted the CYS interview. *Ramos*, 532 A.2d 465. The Superior Court found that the defendant's inculpatory statements to the CYS worker were inadmissible because they were obtained in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966). *Id.* The CYS caseworker interviewed the defendant in jail, and there was no dispute regarding the custodial nature of the interrogation. Accordingly, the Superior Court properly concluded that the CYS worker in *Ramos* was assisting the police in investigating a crime.

The role of Geist in this case is distinguishable. Geist interviewed A.A. out of concern for the plight of Appellant's children. He was not involved in the criminal case against Appellant. His questioning was not intended to make the case against Appellant. Moreover, the status of the individual questioning the defendant is but one consideration into whether a statement was given during a custodial interrogation. *Commonwealth v. McGrath,* 504 Pa. 103, 470 A.2d 487 (1983) ("The determination of whether statements were elicited at a custodial interrogation must be made in light of the totality of circumstances involved, and the status of the questioner is only one of the relevant circumstances.").

Where law enforcement is not involved, the primary purpose test does not apply and an emergency is not a prerequisite to finding the statements nontestimonial. Because Geist was not acting as an agent of law enforcement, the primary purpose test does not apply. Rather, we should look to *Crawford*'s core class of testimonial statements to determine whether the statements at issue here qualifies as the functional equivalent of "*ex parte* in-court testimony,"

Crawford, 541 U.S. at 51, and are therefore testimonial. Because we are not concerned here with statements provided in affidavits, depositions, during police interrogations, or prior testimony at a preliminary hearing, before a grand jury, or at a former trial, the remaining formulation of *Crawford*'s core class of testimonial statements is the objective witness test. This test asks whether statements were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.* at 52.

Considering all of the circumstances of Geist's interview, an objective person in A.A.'s position would not reasonably have anticipated that her statements might be used in a later prosecution of Appellant. There is no evidence that Geist elicited A.A.'s statements to preserve them for trial. The lack of formality connected with the interview would have objectively indicated to A.A. that she was not "bearing testimony" against Appellant. An objective witness could have reasonably believed that her statement to Geist was made to ensure the children's safety.

I conclude that A.A.'s statements were nontestimonial because they were provided to Geist, who was not acting as a law enforcement officer. In contrast, the Majority concludes that the child's statements are nontestimonial because, although Geist was acting as law enforcement, the primary purpose of his interview was to meet an ongoing emergency. I recognize that my disagreement with the Majority may appear to be a minor, nuanced point. However, I am wary of the implications of concluding that Geist was acting as an agent of law enforcement in this context.

Specifically, construing the CYS worker as law enforcement because he was contacted by the hospital and was responsible for J.A.'s safety makes the admissibility of A.A.'s statements contingent on whether there was an ongoing emergency. As explained above, I do not believe that there is such a requirement under *Crawford*.

Justice GREENSPAN joins this opinion.

APPENDIX B

SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

RICKEY LEE ALLSHOUSE, JR.,
Appellant.

Argued Nov. 14, 2006
Filed April 18, 2007
Reargument Denied July 2, 2007

BEFORE: ORIE MELVIN, McCAFFERY, and TAMILIA, JJ.

OPINION BY TAMILIA, J.:

Ricky Lee Allshouse, Jr., appeals from the November 2, 2005, judgment of sentence of one to three years incarceration, a fine, various costs, and restitution imposed after a jury found him guilty of simple assault[1] and endangering the welfare of a child.[2]

On or about May 26, 2004, the Brookville Police Department was asked by Jefferson County Children and Youth Services (CYS) to investigate a suspected assault on a minor, J.A., at appellant's residence. Record, No. 2, Affidavit of Probable Cause. Upon

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[1] 18 Pa.C.S.A. § 2701(a)(1).

[2] *Id.* at § 4304.

investigation, police learned that on May 20, 2004, appellant and J.A.'s mother were arguing in the family home. Appellant was shouting from the living room, where his seven-month-old son, J.A., and his twin brother were lying in a playpen. J.A.'s mother told police she heard appellant sit on a recliner in the living room and, minutes later, heard him get up from the recliner. The sound of the recliner rocking back on the floor was immediately followed by a "snapping/slapping noise," which was followed by the sound of J.A. crying. Upon hearing this series of noises, J.A.'s mother proceeded to the living room and found appellant retreating towards his bedroom. She also discovered J.A.'s four-year-old sister, A.A., had entered the playpen and was holding J.A.'s head on her lap. *Id.*

Immediately thereafter, J.A. was taken to the Brookville emergency room by his mother. Record, No. 2, Affidavit of Probable Cause. Upon examination, it became apparent J.A. had suffered a spiral fracture to the right humerus caused by "sharp and severe twisting of the arm." Shortly after J.A.'s arrival at the emergency room, hospital officials contacted CYS caseworker John Geist to assess J.A.'s welfare. N.T., 9/19/05, at 93. After assessing the situation and interviewing J.A.'s mother, Geist removed J.A. and his siblings from the family home and placed them with their paternal grandparents. *Id.* at 95, 104.

On May 27, 2004, after appellant informed Geist that A.A. could have possibly been responsible for J.A.'s injury, Geist decided to interview A.A. N.T., 9/19/05, at 104. When Geist asked A.A. if appellant had broken J.A.'s arm, A.A. "seized up quite a bit and

said yes." *Id.* at 108. When Geist asked A.A. how appellant went about breaking J.A.'s arm, A.A. "proceeded to grab ahold of my arm, pull it, and twist." *Id.* at 109. After the interview was cut short by the intervention of appellant's brother, Geist returned to CYS, notified his supervisor, and recommended that A.A. be interviewed by Dr. Allen Ryen, a licensed child psychologist. *Id.*

On June 8, 2004, Dr. Ryen interviewed A.A. N.T., 9/19/05, at 156-157. Dr. Ryen's practice entails treating private patients, working on the Pennsylvania Megan's Law Board, and consulting for various government agencies. *Id.* at 140. During the interview, Dr. Ryen asked A.A. whether something had "happened" to J.A. *Id.* at 145. A.A. replied "Daddy hurt him." *Id.*, *accord N.T.*, Tender Years Hearing, 9/16/05, at 31. A.A. then demonstrated how J.A. was injured. *Id.*

Shortly after these interviews were conducted, appellant was arrested and charged with aggravated assault,[3] simple assault,[4] endangering the welfare of a child,[5] reckless endangerment of another,[6] and harassment.[7] Record, No. 2, Police Criminal Complaint.

On September 16, 2005, the trial court held a tender years hearing pursuant to 42 Pa.C.S.A. §

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[3] 18 Pa. C.S.A. § 2702(a)(1).

[4] *Id.* at § 2701(a)(1).

[5] *Id.* at § 4304.

[6] *Id.* at § 2705

[7] *Id.* at § 2709(a)(1).

5985.1, **Admissibility of certain statements**, also known as the Tender Years Hearsay Act (the Act) to determine whether the statements given by A.A. to Geist and Dr. Ryen were admissible under the tender years exception to the hearsay rule. By Order dated September 16, 2005, the trial court deemed A.A.'s statements admissible, thereby allowing both Geist and Dr. Ryen to testify about the contents of their interviews with A.A. Record, No. 30.[8] On September 19, 2005, appellant filed a motion to reconsider asserting A.A.'s statements were testimonial hearsay and, hence, inadmissible pursuant to the United States Supreme Court's ruling in *Crawford v. Washington*, 541 U.S. 36 (2004).

At trial, in addition to allowing both Geist and Dr. Ryen to testify about A.A.'s statements, the trial court also admitted testimony from pediatrician Dr. Holly Davis. N.T., 9/19/05, at 170. Dr. Davis testified that J.A.'s spiral fracture was caused by tremendous force which could not have been generated by a four-year-old child. *Id.* at 191. Notably, Dr. Davis testified she had reviewed Dr. Ryen's records and agreed that the discussion in his report of how A.A. described the twisting and pulling action performed on J.A. by

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[8] A prerequisite for admitting hearsay evidence under the tender years exception is that the child witness must either testify or be "unavailable" within the meaning of the statute. *See* 42 Pa.C.S.A. § 5985.1(a)(2)(ii). (a)(2)(ii). The trial court, in ruling A.A.'s statements to Geist and Dr. Ryen were admissible, necessarily found A.A. was unavailable to testify. Appellant does not attack this determination on appeal and concedes A.A. was unavailable. Appellant's brief at 44.

appellant was consistent with the findings she made after examining J.A.'s x-rays. *Id.* at 196.

On September 20, 2005, the jury convicted appellant of simple assault and endangering the welfare of a child and found him not guilty of aggravated assault and recklessly endangering another person. Thereafter, the trial court denied appellant's motion for reconsideration, thus concluding A.A.'s statements to both Geist and Dr. Ryen were "non-testimonial" hearsay within the meaning of *Crawford*. Record, No. 34.

On November 14, 2005, appellant filed post-sentence motions seeking a modification of sentence and seeking, *inter alia*, a judgment of acquittal on the endangering the welfare of a child conviction. Record, No. 43. By Opinion and Order of March 9, 2006, the court vacated an award of restitution payable to CYS but otherwise denied the motions. Record, No. 50. Appellant perfected a timely appeal with this Court and now raises the following issues for our review:

> 1. Are statements from a non-testifying child witness who was never cross-examined testimonial and thus excludable under the confrontation clause as required by *Crawford v. Washington*?
>
> 2. Did the admission of statements under the Tender Years Hearsay Act violate the ex post facto clause?
>
> 3. Can a fine be upheld when the court does not consider the statutory requirements of [42 Pa. C.S.A.] Section 9726 [**Fine**]?

4. Can a restitution and costs order be upheld when the Commonwealth does not satisfy its burden of proof and where the Court fails to direct how the restitution should be paid?

5. Can an order to pay Sheriff transportation costs be upheld when there is no statutory authority and does a policy imposing such costs violate the sentencing code's demand for individualized sentence?

Appellant's brief at 6.

Crawford, _Davis_, and Testimonial versus Non-Testimonial Hearsay

In considering appellant's first issue which specifically references *Crawford*, *supra*, we are required to apply the very recent United States Supreme Court decision in *Davis v. Washington*, 547 U.S. 813 (2006), for one of the first times in this Commonwealth. *See In re S.R.*, 2007 Pa. Super. 79, 920 A.2d 1262 (2007). Hence, our standard of review over the trial court's admission of A.A.'s statements to Geist and Dr. Ryen is *de novo* and our scope of review is plenary. *Commonwealth v. Corban Corp.*, 909 A.2d 406 (Pa. Super. 2006).

By way of historical development, in 1980 the United States Supreme Court handed down *Ohio v. Roberts*, 448 U.S. 56 (1980), which held the admission of hearsay testimony made by an unavailable witness against a criminal defendant is admissible under the Confrontation Clause[9] if the statement is surrounded by "adequate indicia of reliability." Such indicia exist,

[9] U.S. Const. amend. VI.

according to *Roberts*, when the testimony being considered either fits within a "firmly rooted hearsay exception" or contains "particularized guarantees of trustworthiness." *Roberts*, *supra* at 66.

Almost 25 years later, in the summer of 2004, the Supreme Court overruled *Roberts*, at least in part. *Crawford*, *supra* at 67 (referring to *Roberts* as a "fundamental failure" on the Court's part to interpret the Constitution). In so doing, the Court held:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. *Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.* We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.

Crawford, *supra* at 68 (emphasis added and internal reference omitted).[10]

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[10] The statement at issue in *Crawford v. Washington*, 541 U.S. 36 (2004), was rendered by the defendant's wife (Crawford) during a formal police interrogation at the station house. *Id.* at 36. Due to the fact that the spousal privilege barred the declarant from testifying, the prosecution sought to introduce the declarant's

Predictably, lower courts wrestled with the distinction between testimonial and non-testimonial hearsay in the wake of *Crawford*.[11] Subsequently, in the summer of 2006, the Court clarified this distinction in *Davis*, which was handed down while this appeal was pending, by stating the following:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose* of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, *and* that the *primary purpose* of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, *supra* at 2273-2274 (emphasis added).

The *Davis* Court was careful to note that statements made in the absence of interrogation could still conceivably be considered testimonial. *Id.* at 2274 n.1. The Court further noted that its holding made it "unnecessary to consider whether and when statements made to someone other than law

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statements to undermine the defendant's assertion of self-defense in a subsequent trial for assault and attempted murder. *Id.* at 40-41. The Court held the declarant's statement was inadmissible as testimonial hearsay and reversed defendant's judgment of sentence. *Id.* at 68-69.

[11] *See, e.g.*, *Commonwealth v. Holton*, 906 A.2d 1246, 1253-1255 (Pa. Super. 2006), *discussing United States v. Hendricks*, 395 F.3d 173, 181 (3d Cir. 2005).

enforcement personnel are 'testimonial.'"[12] *Id.* Recognizing, therefore, that non-testimonial statements can be given to *law enforcement officials* pursuant to *Davis*, there can be little question that statements offered to non-law enforcement witnesses can be deemed non-testimonial.

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[12] An exhaustive research effort indicates there is no case currently on the Supreme Court's docket that raises the current issue—either on a grant of *writ of certiorari* or pending a decision on whether *certiorari* should be granted.

Notably, however, in *Whorton v. Bockting*, 549 U.S. 406 (2007), it was determined the *Crawford* rule does not apply retroactively in that it announced a new rule of criminal procedure.

Courts in a few of our sister states did consider issues similar to the one *sub judice* after *Davis* was handed down. In every instance, these courts held a child's out-of-court statements were inadmissible testimonial hearsay, albeit each in a unique context and for unique reasons. *See e.g.*, *State v. Hooper*, 2006 Ida. App. Lexis 83, ___P.3d___, 2006 WL 2328233 (Idaho Ct. App. 2006) (holding a child sex abuse victim's statement to a nurse was inadmissible as testimonial hearsay because the nurse was acting at the behest of law enforcement); *Missouri v. Justus*, 205 S.W.3d 872 (Mo. 2006) (holding, in part, that videotaped testimony taken from a child by a licensed social worker, admittedly for law enforcement purposes, was inadmissible because "there was not an ongoing emergency and because the primary purpose of the interrogations was to prove past events potentially relevant to a later criminal prosecution."); *New Jersey v. Buda*, 912 A.2d 735 (App. Div. 2006) (holding an injured child's statement to a social worker was inadmissible through the testimony of a social worker but a similar statement was admissible through the testimony of the child's mother); *Oregon v. Pitt*, 147 P.3d 940 (Or. App. 2006) (holding videotaped testimony of two children was inadmissible as testimonial).

In order to properly analyze the question of whether A.A.'s statements to Geist and Dr. Ryen were testimonial, we must further discern the exact nature of the Court's "primary purpose" test. The most fertile ground for this discernment lies in the Court's initial application of the primary purpose test in *Davis*.

Davis was a consolidated appeal wherein the Court found one set of statements under examination, made by a wife (Hammon) to police officers dispatched to investigate a domestic disturbance in a battery affidavit, were testimonial and, hence, non-admissible under the Confrontation Clause. *Id.* at 2278. Concurrently, however, the Court found a second set of statements made by a spousal abuse victim (McCottry) to a 911 operator were non-testimonial. *Davis*, *supra* at 2277.

In reaching these findings, the Court implicitly emphasized a number of factors that were consistent with the formulation, outlined above, wherein statements are considered testimonial (in the police interrogation context) "when the circumstances objectively indicate that there is no such ongoing emergency, *and* that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal - prosecution." *Davis*, *supra* at 2273-2274.

For example, in analogizing Crawford's statement, which was found to be inadmissible, with Hammon's statement, the Court noted:

> What we called the "striking resemblance" of the *Crawford* statement to civil-law *ex parte* examinations is shared by [Hammon's]

> statement here. Both declarants were actively separated from the defendant—officers forcibly prevented [Mr. Hammon] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.

Davis, *supra* at 2278 (internal citation omitted).

In distinguishing Crawford's statements from McCottry's statements to the 911 operator, the Court, in relevant part, noted the following:

> And finally, the difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

Davis, *supra* at 2276-2277.

The Court's application of the primary purpose test, as gleaned from the above passages, implies that a number of factors must *all* be considered in determining whether a statement is testimonial; the use of the word "and" indicates that both prongs of the test must be satisfied before a statement can be

considered testimonial. In satisfying the first half of the *Davis* test by determining whether the statement being examined was given during an ongoing emergency, only one factor needs to be examined—the temporal relation of the statement being examined to the wrong the statement describes. *See Davis*, *supra* at 2273-2274.

Satisfying the primary purpose prong of the *Davis* test, in contrast, encompasses examination of two factors. The first factor that must be considered is the objective intent of the declarant and the objective intent of the questioner in giving and eliciting the statement being considered. *Id.* ("Both statements *deliberately* recounted, *in response to police questioning*, how potentially criminal past events began and progressed.") *Davis*, *supra* at 2278 (emphasis added). Furthermore, the environment in which the statement was given, including the attendant formalities, must also be considered. ("And finally, the difference in the level of formality between the two interviews is striking. . . . McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe.") *Id.* at 2276-2277. In sum, the Court's primary purpose test seems to be a variant of the totality of the circumstances test with parameters that are more specifically defined.[13]

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[13] The ultimate effect of admitting a particular statement into evidence does not seem to be a dispositive factor in the analysis. This is logical because every inculpating statement, however it may come to eventually be defined, is damaging to a criminal defendant and, hence, using an effects test as a factor would be futile as it would always be satisfied.

With this framework in mind, we turn to an analysis of the specific testimony at issue in this case.

A.A.'s Statements to Geist

Geist testified he had initially met with appellant and his family when J.A. was in the hospital. N.T., Tender Years Hearing, 9/16/05, at 8. He said he made the decision to remove the Allshouse children from appellant's home after hearing inconsistencies in J.A.'s mother's story and listening to the concerns of the treating physician. N.T., 9/19/05, at 94. Geist testified that appellant had alleged, on May 27, 2004, A.A. had been the one responsible for J.A.'s broken arm. N.T., 9/19/05, at 128-129 ("It was brought to my attention from Ricky there might have been a possibility she may have caused the injury. So I wanted to talk to her to do an interview."). It was only after this allegation was leveled that Geist became interested in interviewing A.A.[14] *Id.*

Geist conducted the interview on the front porch of the Allshouse's home and he was dressed casually. N.T., 9/19/05, at 104, 106. He began the questioning by asking A.A. whether she remembered her brother being injured. N.T., Tender Years Hearing, 9/16/05, at 11. When she replied that she did so remember, Geist

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[14] Geist testified that he first interacted with A.A. while transporting her, along with her siblings, to their grandparents' home for temporary placement. N.T., Tender Years Hearing, 9/16/05, at 13-14. There is no evidence, however, that Geist questioned A.A. at this point, even though it would have been the perfect opportunity to do so considering A.A. was under Geist's exclusive supervision and control.

then asked if J.A.'s twin brother had caused the injury. *Id.* When he was told no, he asked if J.A.'s mother had caused the injury. *Id.* After he was told no again, he asked A.A. if she herself had caused J.A.'s injury. *Id.* After being told no once more, Geist finally asked if appellant had caused the injury. *Id.* After A.A. informed Geist that appellant had broken J.A.'s arm, A.A. demonstrated how the injury was inflicted. *Id.* The interview came to an abrupt conclusion when one of appellant's brothers intervened and A.A. refused to continue talking. *Id.*

Examining the facts and circumstances of this interview leads us to the conclusion that A.A.'s statements are admissible as non-testimonial under *Crawford*, should a hearsay exception prove applicable. *See infra.* While we recognize Geist conducted the interview a full seven days after the assault, the intentions of Geist and A.A. as well as the attendant environmental factors indicate A.A.'s statements are, indeed, non-testimonial in nature.[15]

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[15] There is some question as to whether A.A. was being abused in some way by her grandparents and other members of the family and, therefore, an argument could be made that an ongoing emergency *was* present. As discussed above, A.A. seized up when asked whether appellant had broken J.A.'s arm. "She started shaking. Closed body language. She was looking around to see if anyone heard her statement." N.T., Tender Years Hearing, 9/16/05, at 11. When appellant's brother interrupted her interview with Geist, A.A. immediately stopped talking. *Id.*

Additionally, Dr. Ryen testified that when he first met A.A. she immediately separated from her grandparents and gravitated towards him. "The grandparents seem to be upset and clearly some tension between [A.A.] and the grandparents. Almost immediately, she separated from the grandparents and put myself between her and the grandparents, which I find unusual.

Presently, appellant does not dispute Geist's contention that he only wanted to interview A.A. after appellant accused the young girl of harming J.A., and it would be absurd to assume A.A. had intended to give statements for use in a legal proceeding. Geist's failure to interview A.A. when he had her under his supervision also indicates Geist's contention is credible and, hence, there is little question Geist's *primary purpose* in interviewing A.A. was not to establish past events which would be potentially relevant in a criminal trial, but to ensure both A.A. and her siblings' welfare was secure while they remained in the custody of their grandparents.[16] *See also, Agilera v. Indiana*, 862 N.E.2d 298, 306 (Ind. Ct. App.2007) (defining non-testimonial statements as ". . . statements [that] were made for purposes of gathering information about what happened and finding out if the child was harmed, not in preparation to prosecute"). In addition

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I'm a total stranger to this child." N.T., 9/19/05, at 143. Dr. Ryen got the impression A.A. had been "threatened or coerced" by somebody prior to his interview with her. N.T., Tender Years Hearing, 9/16/05, at 33. After conducting the interview with A.A., appellant's father apparently informed Dr. Ryen that A.A. had been the one who injured J.A. *Id.* at 34-35. The grandparents also discussed how children who misbehave "require spanking and things" in the presence of A.A. immediately after the interview. N.T., Tender Years Hearing, 9/16/05, at 49.

This evidence demonstrates A.A. was in some form of distress, although the degree to which this is so is not evident from the record and there is a question of whether imminent danger was present. This distress was the result of her being a witness to appellant's aggression towards J.A.

[16] It goes without saying that Geist was not planning on using the information gathered through the interview to initiate a prosecution against four-year-old A.A.

thereto, Geist did not report A.A.'s statements to law enforcement but, rather, notified his CYS supervisor of them after the interview, even though he had the option of reporting the incident to the police.[17] N.T., 9/19/05, at 109.

Furthermore, the environment surrounding the interview does not indicate A.A.'s statements were testimonial. As noted above, Geist was dressed casually and the interview was conducted on neutral ground. Additionally, Geist had no control over the interviewing environment—as his inquiries were cut

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[17] Geist followed the statutory procedure in notifying his CYS supervisor, which requires him to report suspected instances of child abuse to the Department of Public Welfare. *See* 23 Pa.C.S.A. § 6311, **Persons required to report suspected child abuse**; *see also*, 23 Pa.C.S.A. § 6313, **Reporting procedure**. A diligent research effort has failed to uncover a statutory provision requiring CYS workers to report suspected incidents of child abuse directly to law enforcement officials, although such reporting is permissible. *See generally,* 23 Pa.C.S.A. § 6313; *see also* 23 Pa.C.S.A. § 6334, **Disposition of complaints received**.

Geist did, however, testify that he was a part of a meeting with the Jefferson County District Attorney held on June 4, 2004. N.T., 9/19/05, at 116. Geist further testified that the District Attorney instructed him during the meeting to be harsher with J.A.'s mother in an attempt to get her to admit her knowledge of the incident. *Id.* While this testimony indicates CYS officials and the D.A.'s office began to work together at some point during this case, there is no evidence of record demonstrating this cooperative effort commenced prior to June 4, 2004. Rather, as alluded to above, the evidence strongly indicates the effort did not commence prior to this time and, that even if it did, the evidence strongly indicates the effort to lean on potential witnesses did not include A.A., as Geist had the uninhibited opportunity to question her and her siblings while transporting them to the grandparents' home and refrained from doing so. *See* footnote 13, *supra*.

short after appellant's brother intervened. *See Davis, supra* at 2278. There was simply no semblance of formality during the interview.

In sum, we do not view the Supreme Court's primary purpose test as being reliant solely on the temporal relationship between the statement and the wrong the statement describes and, instead, view the test as encompassing the broader range of factors applied in *Davis*. Inasmuch as this is the case, we conclude Geist's testimony is non-testimonial. In so holding, we wish to emphasize that we are not answering the broader question of "whether and when" statements made to a party not involved with law enforcement is testimonial, as that broad question is more properly left for the United States Supreme Court. We are merely holding that A.A.'s statements to Geist are non-testimonial in this particular case. The question of their admissibility is dealt with *infra*.

A.A.'s Statements to Dr. Ryen

A.A.'s statements to Dr. Ryen present a close question. Dr. Ryen interviewed A.A. on June 8, 2004, by which time any ongoing emergency had arguably abated.[18] *See Davis, supra* at 2273-2274. Dr. Ryen testified that he sits on this Commonwealths' Megan's Law Board, is an active court officer in three counties (including Jefferson, where J.A. was injured), and is active in performing child custody mediations in three counties (including Jefferson). N.T., Tender Years

[18] We use the word "arguably" because there is a question as to whether A.A. was being abused in some way by her grandparents and/or other members of the family as discussed at length above. *See* footnote 15, *supra*.

Hearing, 9/16/05, at 26. When defense counsel asked Dr. Ryen what the goal of his interview with A.A. was, Dr. Ryen acknowledged the interview was being conducted for "investigative purposes." N.T., 9/19/05, at 149. He further acknowledged that he conducted the interview suspecting appellant was the perpetrator and A.A. was a witness. *Id.* at 150.

Conversely, Dr. Ryen testified that he considered A.A. to be a patient. N.T., 9/19/05, at 158. He noted that the interview was conducted in his office, which is "sort of a big play room." N.T., Tender Years Hearing, 9/16/05, at 29. He further testified that he asked A.A., "Did something happen to your baby brother?"—to which A.A. replied spontaneously "Daddy hurt him." N.T., 9/19/05, at 145.

After careful consideration, we conclude the evidence of record is insufficient to determine whether A.A.'s statements to Dr. Ryen are testimonial as it is impossible to determine what Dr. Ryen's primary purpose was in conducting the interview.[19] Whatever

[19] Appellant seemingly does not challenge the admission of the portion of Dr. Davis' testimony that discussed Dr. Ryen's interview report. *See* Pa. R. Evid. 805, **Hearsay within hearsay**. Even if he had, however, we would find this admission to constitute harmless error based on the analysis of Dr. Ryen's testimony contained herein.

Furthermore, Dr. Davis rendered an opinion that A.A. could not have possibly caused J.A.'s fracture prior to testifying that she agreed with Dr. Ryen's report and its rendering of A.A.'s statements. N.T., 9/19/05, at 195-196. This admissible opinion, standing alone, inculpates appellant because the dispute is whether he or A.A. is the perpetrator– no one has alleged A.A.'s mother, the only other adult capable of producing the requisite force present during the assault, broke J.A.'s arm.

the case may be, it is unnecessary to determine whether A.A.'s statements to Dr. Ryen are testimonial because even if they are, thereby being inadmissible, the admission of these statements constitutes harmless error.

In a recent case, an *en banc* panel of this Court outlined the central tenets of the harmless error doctrine as follows:

> This Court has stated that an error may be harmless where the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the error is so insignificant by comparison that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict. Under this approach, a reviewing court first determines whether the untainted evidence, considered independently of the tainted evidence, overwhelmingly establishes the defendant's guilt. If "honest, fair minded jurors might very well have brought in not guilty verdicts," an error cannot be harmless on the basis of overwhelming evidence. Once the court determines that the evidence of guilt is overwhelming, it then decides if the error was so insignificant by comparison that it could not have contributed to the verdict. We have cautioned that:
>
> > "A conclusion that the properly admitted evidence is 'so overwhelming' and the prejudicial effect of the . . . error is 'so insignificant' by comparison, that it is clear

> beyond a reasonable doubt that the error is harmless, is not to be arrived at lightly."
>
> Accordingly, we have been reluctant to find an error harmless on the basis of overwhelming evidence.
>
> *Commonwealth v. Drummond*, 775 A.2d 849, 853 (Pa. Super. 2001), *quoting Commonwealth v. Rasheed*, 536 Pa. 567, 570-571, 640 A.2d 896, 898 (1994).

In this case, the untainted evidence presented by the Commonwealth is so overwhelming that no reasonable juror would have found for appellant had he or she only considered this untainted evidence. Dr. Burke, J.A.'s treating physician in the emergency room, testified that he was immediately suspicious about J.A.'s injury, and this suspicion led him to report the case to CYS. N.T., 9/19/05, at 34. J.A.'s mother vividly testified about the progression of events leading up to J.A.'s injury, and when asked why she no longer resides with appellant, she answered "Because he broke my son's arm." N.T., 9/19/05, at 42. The Commonwealth also offered the deposition testimony of the radiologist who read J.A.'s x-ray, Dr. Paisley, who testified that spiral fractures are indicative of child abuse. N.T., 9/19/05, at 73, *admitting* Deposition Testimony, 9/12/05, Dr. Kevin John Paisley, M.D., at 24. Additionally, the Commonwealth offered Geist's testimony, which included A.A.'s statements to him—thereby further incriminating appellant.[20] Finally, the Commonwealth offered the medical opinion of board

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[20] A.A.'s statements are admissible as discussed *infra*.

certified pediatrician Dr. Davis, which provided that A.A. was physically incapable of causing J.A.'s spiral fracture. When this evidence is considered in its totality, it becomes clear Dr. Ryen's testimony pertaining to A.A.'s statement is merely duplicative.

Appellant, on the other hand, offered no exculpatory evidence, not even a single witness. There was no attempt to substantiate the allegation that A.A. could have caused the injury—either through medical testimony or through personal testimony. Indeed, appellant's stance on this appeal indicates he is hanging his hopes of exoneration on the allegation that the trial court erred as a matter of law—not on the relative strength of the evidence of record.[21]

Consequently, even if we assume *arguendo* that A.A.'s statements to Dr. Ryen are testimonial and non-admissible, the trial court's error in admitting them constitutes harmless error beyond a reasonable doubt. *See Drummond, supra* at 853.

Ex Post Facto **Application of the Tender Years Hearsay Act**

Inasmuch as the trial court found A.A.'s statements to Geist were non-testimonial, the trial court was forced to find an exception to the hearsay rule in order to admit A.A.'s statements as they were

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[21] Appellant devotes seven pages of his ninety-nine page brief to attacking the imposition of $100 in fees as part of his sentence. Appellant's brief at 64-70. It is inconceivable that he would not attack the sufficiency and weight of the evidence had there been a chance his judgment of sentence could be reversed on such grounds.

still classic hearsay.[22] *See* Pa.R.Evid. 801(c), **Definitions**. The exception upon which the trial court relied is found in the Tender Years Hearsay Act, *supra*, which provides:

> **(a) General rule.**—An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:
>
> (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) the child either:
>
> (i) testifies at the proceeding; or
>
> (ii) is unavailable as a witness.

42 Pa.C.S.A. § 5985.1, **Admissibility of certain statements**.

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[22] We have already dealt with the admission of A.A.'s statements to Dr. Ryen, finding their admission constituted harmless error even if it was assumed their admission was erroneous. Consequently, we will not analyze the admission of these statements anew.

Here, appellant attacks the trial court's application of this provision by asserting that it violated the prohibition against *ex-post facto* laws because at the time the charges were filed against him, the precursor to the current form of 42 Pa.C.S.A. § 5985.1 provided that an out-of-court statement made by a child victim or witness would only be admissible under the provision if the alleged act was "performed with or on the child by another." *See* 2004 Pa. Legis. Serv. Act. 2004-87. Appellant argues the trial court's application of the current provision, passed after he was charged, constitutes *ex post facto* application because it "alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offence, in order to convict the offender." *See Calder v. Bull*, 3 U.S. 386, 390 (1798).

Appellant's contention raises a pure question of law and, thus, our standard of review is *de novo* and our scope of review is plenary. *Corban Corp.*, *supra* at 410. The argument invites us to consider whether the new version of the Act allows courts of this Commonwealth to "receive less, or different, testimony" than did the prior version of the Act. We find such an exercise would be superfluous, even if we were to assume, as appellant does, that the phrase "with or on" contained in the precursor to the current Act forecloses the possibility of applying the tender years exception to a statement from a child who was not directly acted upon by the perpetrator.

As discussed above, in 1980 the United States Supreme Court in *Ohio v. Roberts* held that the admission of hearsay testimony made by an

unavailable witness against a criminal defendant is admissible under the Confrontation Clause if the statement is surrounded by an "adequate indicia of reliability." *Roberts*, *supra* at 66. Such indicia exist, according to *Roberts*, when the testimony being considered either fits within a "firmly rooted hearsay exception" or contains "particularized guarantees of trustworthiness." *Id.*

The trial court, by applying the Act to the current controversy, was required to find A.A. was unavailable and was also required to find indicia of reliability.[23] 42 Pa.C.S.A. § 5985.1. The record demonstrates the indicia of reliability ultimately found by the trial court was not the Tender Years Hearsay Act itself, in accordance with the aspect of the *Roberts* definition that allows reliability to be found in a "firmly rooted hearsay exception." Indeed, in finding Geist's testimony admissible, the Honorable President Judge Foradora noted: "I also find that Mr. Geist's statement, because of the content, location, and nature of the statement, that it's also reliable." N.T., Tender Years Hearing, 9/16/05, at 53. Appellant does not challenge these findings on appeal.

Consequently, the trial court's finding of reliability, which was not in the form of a "firmly rooted hearsay exception" and was premised on a finding of "particularized guarantees of trustworthiness," satisfies *Roberts*, which was binding precedent when appellant was charged and remains binding precedent in analyzing the admission of non-

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[23] As previously noted, appellant concedes A.A. was unavailable.

testimonial hearsay today.[24] Thus, even if we assume *arguendo* the trial court's application of the Act constitutes an *ex post facto* violation, this application is inconsequential, as the trial court simply could have applied *Roberts* and reached the identical result. There is no reason to reverse and remand, as the trial court could simply reach the same result by stating that it is applying *Roberts*. We decline the opportunity to delay the resolution of this case simply so the trial court can correct itself semantically. We therefore find Geist's testimony to be admissible.[25]

Judgment of Sentence

Appellant's final four issues pertain to the trial court's imposition of fines, restitution, costs of prosecution, and transportation costs. At the outset, we note that sentencing is a matter vested within the

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[24] The Federal Circuit Courts of Appeals that have considered the question of whether the *Ohio v. Roberts*, 448 U.S. 56 (1980), analysis governs the admission of non-testimonial hearsay evidence have unanimously held or assumed it does and this consensus includes the Third Circuit. *See e.g., United States v. Feliz, et al.*, 467 F.3d 227, 71 Fed. R. Evid. Serv. (Callaghan) 734, __ (2d Cir. 2006); *Summers v. Dretke*, 431 F.3d 861, 877 (5th Cir. 2005); *United States v. Hinton*, 423 F.3d 355, 358 n.1 (3d. Cir. 2005) ("Furthermore, the admission of non-testimonial evidence is still governed by *Roberts.*") (citations omitted); *United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005); *United States v. Franklin*, 415 F.3d 537, 546 (6th Cir. 2005) (citations omitted); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004).

[25] We recognize the consequence of our holding is that no *ex post facto* challenge to the application of the current version of the Act will be worth intensive review, provided trial courts continue to find indicia of reliability based on circumstances and not hearsay exceptions.

sound discretion of the trial judge, and a sentence will not be disturbed absent a manifest abuse of discretion. *Commonwealth v. Perry*, 883 A.2d 599, 602 (Pa. Super. 2005). In order to demonstrate an abuse of discretion has occurred, appellant must establish, by reference to the record, that the trial court ignored or misapplied the law, exercised its judgment for untoward reasons, or arrived at a manifestly unreasonable decision. *Id.*

Appellant first contends the trial court erred by failing to consider the mandates of 42 Pa.C.S.A. § 9726(c), **Fine,** before imposing a $100 dollar fine. Inasmuch as this challenge is a challenge to the legality of the sentence (i.e., the fine was imposed unlawfully), appellant's challenge is brought as of right. *See Commonwealth v. Mouzon,* 571 Pa. 419, 812 A.2d 617, 622 (2002) (plurality), *citing* 42 Pa.C.S.A. § 9781, **Appellate review of sentence** (contrasting appeals of right based on legal challenges from appeals from the discretionary aspects of a sentence, which can only be brought by grant of allocatur), *accord Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. 2005).

Appellant argues the trial court erred in failing to apply section 9726(c), which requires a court to consider a defendant's present and future solvency and whether a fine will prevent a defendant from paying restitution before imposing a fine. The Commonwealth, on the other hand, asserts the trial court considered the work history outlined in appellant's pre-sentencing investigation report and, as such, complied with the statute.

Commonwealth v. Thomas, 879 A.2d 246 (Pa. Super. 2005), is directly on point and requires us to vacate the trial court's imposition of the fine and remand for specific findings in accordance with section 9726(c) to determine an appropriate fine. In *Thomas*, we rejected the identical argument raised by the Commonwealth and found a trial court must enter specific findings that would allow it to determine whether a defendant could pay a specific amount in fines. *Id.* at 264.[26] On remand, the trial court is charged with conducting an inquiry as outlined in

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[26] While it is true that the pre-sentencing investigation report was not part of the certified record in *Commonwealth v. Thomas*, 879 A.2d 246 (Pa. Super. 2005), whereas the attendant report is a part of the certified record in the matter *sub judice*, this distinction does not alter our decision. Appellant's pre-sentencing report merely reads "Current Employment/Source of Income: Rick has been self employed as an auto mechanic for the past 10 years. He also is a welder." Record, No. 50.

The trial court stated that, in arriving at the amount of the fine imposed, it considered both the report and appellant's "implication" that he possessed "unreported marketable skills." Trial Court Opinion and Order on Defendant's Post-Sentence Motions, Foradora, P.J., 3/09/06, at 1-2.

Obviously, this bland evidence is wholly insufficient to establish what an appropriate fine would be. Thus, although we are loath to expend judicial resources on the reconsideration of a fine that would be considered *de minimis* to most, we note that our precedent strongly suggests we strictly adhere to the mandates of 42 Pa.C.S.A. § 9726(c). *See Thomas*, *supra* at 264, *accord Commonwealth v. Gaskin*, 325 Pa. Super. 349, 472 A.2d 1154, 1158 (1984). Moreover, this matter must be remanded for other purposes, as discussed *infra*.

section 9726 to determine what amount appellant should be fined.

Appellant next alleges the Commonwealth did not meet its burden of proof in asserting appellant was obliged to pay restitution to the Crime Victims Compensation Fund. This challenge also implicates the legality of appellant's sentence and, as such, is brought as of right. *See Mouzon, supra* at 622, *accord Commonwealth v. Redman,* 864 A.2d 566, 569 (Pa. Super. 2004).

Appellant asserts the trial court's Order, requiring him to pay $1,000 in restitution to the Crime Victims Compensation Fund, was unsupported by the evidence of record. He further contends the court erred by failing to require the Commonwealth to give a recommendation on restitution.

This Court has noted that although the statutory requirement is to award "full" restitution, the amount of full restitution must be arrived at through the adversarial system where the defendant is afforded due process. *Commonwealth v. Ortiz,* 854 A.2d 1280, 1282 (Pa. Super. 2004) (*en banc*). Unless the statute under which a defendant is convicted contains a restitution provision, the Commonwealth is required to make a recommendation to the court prior to sentencing concerning the amount of restitution to be ordered. *See Redman, supra* at 570, *accord* 18 Pa.C.S.A. § 1106, **Restitution for injuries to person or property** (c) **Mandatory restitution** (4)(i).

The statutes under which appellant was convicted do not contain restitution provisions. *See* 18 Pa.C.S.A. § 2701 and § 4304 *supra.* Further, the record contains

no indication the Commonwealth recommended any amount for restitution. *See generally*, N.T. Sentencing Hearing, 11/02/05, at 25. Thus, we are constrained to vacate the award of restitution in the face of unambiguous statutory language and remand for a determination as to the appropriate amount of restitution to be awarded. "It *shall* be the responsibility of the district attorneys of the respective counties to make a recommendation to the court at or prior to the time of sentencing as to the amount of restitution to be ordered." 18 Pa.C.S.A. § 1106(c)(4)(i) (emphasis added.) Appellant's allegation, that the trial court erred by failing to concoct a "method" for repaying restitution under 18 Pa.C.S.A. § 1106(c)(2)(ii), is moot and warrants no further consideration inasmuch as we have determined a remand is necessary to determine the amount of restitution owed.[27]

As to the costs of prosecution,[28] appellant contends the trial court erred in awarding the costs to the Commonwealth pursuant to 16 P.S. § 1403, **Expenses incurred by district attorney**, because no evidence

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[27] We note that while 18 Pa.C.S.A. § 1106(c)(2) requires the trial court to specify an "amount and method" of restitution at sentencing, subsection (ii) of the provision states that the court "may" order restitution according to any schedule it deems just. Based on this language, we find no inherent problem with the court's decision to forego ordering a repayment schedule until after appellant is released from incarceration.

[28] Like a challenge based on the contention an award of restitution is unsupported by the record is a challenge to the legality of the sentence, we analogously conclude this rationale can be applied to the imposition of costs.

was introduced demonstrating how these costs were calculated or for what they were incurred.

Not only does the Commonwealth begrudgingly concede appellant is entitled to resentencing on this issue, the trial court acknowledges appellant did not receive a bill of costs from the Commonwealth. Appellee's brief at 29; Trial Court Opinion and Order on Defendant's Post-Sentence Motion, Foradora, P.J., 3/09/06, at 3 n.2. Inasmuch as the law is well-settled in this regard, we must vacate the award of the costs of prosecution and remand for a determination as to the amount of costs that should be awarded in this case. *See Commonwealth v. Coder,* 490 Pa. 194, 415 A.2d 406, 410 (1980) (adopting a trial court's interpretation of 16 P.S. § 1403, *supra*, as requiring that any time a district attorney seeks to charge a defendant with costs he or she must provide the defendant with a bill of costs, thereby giving the defendant the opportunity to file exceptions thereto).

Claiming no evidence of record exists to substantiate the costs, appellant also attacks the trial court's decision to order him to reimburse the sheriff's costs for transporting appellant to and from prison to attend hearings.

Appellant's contention is belied by the evidence of record, which demonstrates the sheriff submitted a transportation card to substantiate the $764.48 award of costs. Record, No. 38, Sheriff's Transport Card. Consequently, appellant's argument is frivolous and deserves no further consideration.

Also with regard to the sheriff's transportation costs, appellant contends the trial court erred by

ordering him to reimburse the costs without the express statutory authority to do so. Again, this challenge is a legal challenge that is brought as of right. *Mouzon*, *supra* at 622, *accord Commonwealth v. Jacobs*, 900 A.2d 368, 373 (Pa. Super. 2006).

Initially, we point out that the trial court noted it was imposing the sheriff's transportation costs not as a cost of prosecution but rather a rehabilitative measure pursuant to 42 Pa.C.S.A. § 9728(g), **Collection of restitution, reparation, fees, costs, fines and penalties**. Trial Court Opinion at 5.

At the time appellant's judgment of sentence was entered, that statutory authority stated:

> **(g) Costs, etc.**—Any sheriff's costs, filing fees and costs of the county probation department, clerk of courts or other appropriate governmental agency, including any reasonable administrative costs associated with the collection of restitution, shall be borne by the defendant and shall be collected by the county probation department or other appropriate governmental agency along with the total amount of the judgment and remitted to the appropriate agencies at the time of or prior to satisfaction of judgment.

42 Pa.C.S.A. § 9728(g).

In *Commonwealth v. Gaddis*, 432 Pa. Super. 523, 639 A.2d 462, 472 (1994), this Court held that the term "costs" in this provision did not include the imposition of the costs of prosecution itself but, rather, the terms merely included the costs associated with executing a money judgment from a defendant. This holding stood

until 2006 when our General Assembly decided to amend the language of 42 Pa.C.S.A. § 9728(g) to include "transportation costs and other costs associated with the prosecution" as express "costs" within the meaning of the provision. 2006 Pa. Legis. Serv. Act 2006-143. The Governor approved this amendment, effective immediately, on November 9, 2006. *Id.* From that date forward, therefore, *Gaddis* effectively was overruled, in relevant part, by legislative mandate. The remaining question, therefore, is whether the amended version of 42 Pa.C.S.A. § 9728(g) can be applied retroactively to uphold the trial court's award of transportation costs.[29]

We conclude the amended version of 42 Pa.C.S.A. § 9728(g) cannot constitutionally be applied retroactively, as such application would constitute an *ex post facto* law. *See Calder v. Bull*, 3 U.S. 386, 390 (1798) (holding that a category of *ex post facto* laws includes "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."), *accord Commonwealth v. Kalck*, 239 Pa. 533, 87 A. 61, 62 (1913) (adopting the *Calder* definitions verbatim). In *Gaddis*, *supra*, this Court found 42 Pa.C.S.A. § 9728(g) to be a penal statute, and nothing in the 2006 amendments effect a change in this determination. *See Gaddis* at 472; *see also,* 2006 Pa. Legis. Serv. Act 2006-143. Furthermore, the amended version of 42 Pa.C.S.A. § 9728(g)

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[29] Although appellant did not raise the issue of retroactive application, we believe it is equitable to consider the issue because the amended version of 42 Pa.C.S.A. § 9728(g), **Costs, etc.**, was passed after appellant filed both his brief and reply brief.

attaches greater punishment to all crimes governed by the provision by allowing a court to expand the definition of "costs" that can be imposed.

The trial court's Order of sheriff's transportation costs must, therefore, be vacated. A remand on this issue, however, is inappropriate because transportation expenses cannot be awarded as costs, pursuant to either 42 Pa.C.S.A. § 9728(g) or 16 P.S. § 1403, and also can not be reclassified and then awarded as restitution. *See* 18 Pa.C.S.A. § 1106, **Restitution for injuries to persons or property** (h) (defining restitution as: "The return of the property of the victim or payments in cash or the equivalent thereof pursuant to an order of the court."); accord 42 Pa.C.S.A. § 9721(c), **Sentencing generally**.[30]

Conclusion

Those portions of the judgment of sentence wherein the Commonwealth was awarded a $100 fine, the Crime Victims Compensation Fund was awarded

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[30] The Commonwealth Court recently held that the terms "costs of prosecution" contained in 16 P.S. § 1403, **Expenses incurred by district attorney,** does not include a sheriff's transportation costs incurred for transporting a defendant from a holding facility to court hearings. *Fordyce v. Clerk of Courts*, 869 A.2d 1049, 1051-1053 (Pa. Cmwlth. 2005), *appeal denied* 584 Pa. 710, 885 A.2d 44 (2005), *accord Commonwealth v. Williams*, 909 A.2d 419, 420 (Pa. Cmwlth. 2006). In reaching these decisions, the Court emphasized that two statutes provide that each county is responsible for its sheriff's transportation costs and, thus, it would be erroneous to read the phrase "costs of prosecution" in section 1403 to encompass such costs. *See* 42 P.S. 21113, **Attending court**; *see also,* 61 P.S. § 461.11, **Cost of transporting prisoners**. We agree with the Commonwealth Court's rationale in these cases.

$1,000 in restitution, the Commonwealth was awarded costs of prosecution, and the Commonwealth was awarded the sheriff's transportation costs, are vacated. The matter is remanded for proceedings in which the trial court is directed to determine appropriate amounts for a fine, restitution and the costs of prosecution incurred by the Commonwealth. In all other respects, the judgment of sentence is affirmed.

Jurisdiction relinquished.

McCAFFERY, J., concurs in the result.